TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 22,023.

EDWARD S. DREYER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JANUARY 14, 1903.

(18,021.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 536.

EDWARD S. DREYER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from criminal court of Cook county	2	1
Caption	2	1
Order to select grand jury	2	1
Formation of grand jury, &c	4	2
Indictment	5	3
Order for writ of capias	10	6
Capias and return	10	6
Order fixing amount of bail	12	7
Recognizance	13	7
Order changing venue	15	8
Plea of former jeopardy filed	16	9
Order striking plea of former jeopardy from files	17	10
Order overruling motion to quash indictment	17	10
Arraignment and plea of not guilty	18	10
Order for continuance	18	10
Order denying motion for change of venue	19	11
Order overruling objections to jurisdiction of the court	19	11
Order for jury, &c	20	11

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	Original.	Print
Order beginning hearing	21	12
Order continuing hearing	22	13
Order concluding hearing	23	13
Order discharging jury	23	14
Order beginning second trial	24	15
Order continuing second trial	25	15
Order continuing second trial	26	15
Order continuing second trial	27	16
Order continuing second trial	28	17
Order continuing second trial	29	18
Order continuing second trial	30	18
Order concluding second trial	30	18
Verdict	31	19
Order postponing hearing of motion for new trial	32	20
Order overruling motion for new trial	32	20
Order overruling motion in arrest of judgment	33	20
Judgment	34	21
Bill of exceptions	36	22
Plea of former jeopardy	37	22
Order striking out plea of former jeopardy	42	26
Selection of jury, &c	43	26
Verdict	44	27
Affidavit of Fred. K. Buckminster	46	28
Henry C. McFall	49	30
Alfred S. Austrian	52	31
Alfred S. Austrian	55	32
Albert C. Barnes	56	33
Sanford A. Goss	58	34
Alfred Goranson	61	35
Testimony of Henry C. McFall	62	36
Opening statement for The People	64	37
Opening statement for the defendant	79	43
Evidence for The People	97	51
Testimony of Thomas P. Kennedy	97	51
Exhibit A—Proceedings of board of commissioners	102	54
B—Proceedings of board of commissioners	107	56
C—Proceedings of board of commissioners	108	57
D—Proceedings of board of commissioners	111	58
E—Proceedings of board of commissioners	112	59
F—Proceedings of board of commissioners	119	63
G—Proceedings of board of commissioners	120	63
H—Proceedings of board of commissioners	122	64
I—Bond of Edward S. Dreyer	141	73
K—Bond of Edward S. Dreyer	144	74
L—Bond of Edward S. Dreyer	147	75
M—Bond of Fred M. Blount	152	78
Testimony of A. D. Langworthy	154	79
Exhibit X—Abstract of votes	172	88
Exhibit Y—Clerk's certificate	175	89
Testimony of Thomas P. Kennedy (recalled)	178	90
Exhibit N—Proceedings of board of commissioners	209	107
Testimony of Fred M. Blount	212	109

	Original.	Print
Exhibit O—Warrant, April 13, 1894, &c	215	111
Exhibit P—Warrant, April 13, 1894, &c	218	112
Testimony of Thomas M. Jackson	227	117
Testimony of Wm. S. Bielfeldt	227	117
Agreement as to drafts, &c	236	122
Testimony of George F. Talty	236	122
Rudolph Kohtz	242	126
Adolph Berger	257	133
F. J. Threedy	293	151
Order approving bond of E. S. Dreyer	299	154
Bond of Edward S. Dreyer	301	154
Testimony of Adolph Berger (recalled)	303	155
Exhibit Q—Warrant No. 15466, June 19, 1894	304	156
Exhibit R—Warrant No. 212, Nov. 17, 1896, &c	365	187
People rest	370	190
Motion of defendant to exclude evidence	371	190
Motion of defendant for instructions	372	191
Evidence for defendant	374	191
Testimony of John C. McKeon	374	191
Exhibit A—Certified copy of order appointing John McNulta as receiver	382	195
Testimony of Edward H. Harrison	384	196
Stipulation as to evidence	393	200
Testimony of Wm. M. Devine	394	200
Testimony of Edward H. Harrison (resumed)	402	204
Exhibits M and N—Statement of account	440	224
Testimony of Andrew J. Graham	458	249
Charles J. Vopicka	459	250
Benjamin S. Mayer	460	251
John A. King	462	251
Harlow N. Higinbotham	463	252
Joseph W. Suddard	464	252
James W. Hedenberg	465	253
Benj. C. Bachrach	478	260
Alfred S. Austrian	505	272
Charles A. Kuhn	513	276
Charles C. Cochran	520	279
Albert L. Sercomb	530	284
Luther Laflin Mills	539	289
Joseph Pfirshing	540	290
Michael Brennan	544	292
E. S. Dreyer	546	292
Joseph Stockton	567	303
E. S. Dreyer (recalled)	569	304
Defendant's Exhibit X—Decree of the circuit court of the United States in West Chicago Park Commissioners *vs.* McNulta, receiver	613	327
Y—Order of superior court of Cook county appointing receiver for E. S. Dreyer & Co.	619	329
X, Y, Z—Bank-deposit book	626	332
Defendant rests	627	332

	Original.	Print
Further evidence for The People	627	332
Testimony of E. S. Dreyer	628	333
People rest	631	334
Motion to instruct jury to find defendant not guilty	633	335
Motion to exclude evidence	635	335
Extract from argument for The People	636	336
Instructions asked by The People (given)	637	336
Instructions asked by defendant (given)	652	344
Instructions asked by defendant (refused)	659	347
Verdict	668	352
Motion for new trial	669	352
Motion in arrest of judgment	673	355
Judge's certificate to bill of exceptions	677	357
Stipulation to use original bill of exceptions on appeal	678	357
Clerk's certificate	679	358
Assignment of errors	680	358
Order taking motion for supersedeas and bail under advisement	687	362
Order granting supersedeas and denying bail	687	362
Order taking motion for bail under advisement	687	362
Order denying motion for bail	688	362
Order taking cause under advisement	689	363
Judgment	690	363
Opinion	691	364
Separate opinion of Mr. Justice Cartwright	705	374
Motion for leave to file additional record submitted	710	378
Order denying motion for leave to file additional record	710	378
Order denying rehearing	711	378
Petition for writ of error	712	379
Bond	716	382
Writ of error	718	383
Citation	720	384
Acceptance of service of citation, &c.	721½	385
Clerk's certificate and return	722	385
Assignment of errors	723	386

1 At a supreme court begun and held at Springfield, on Tuesday, the third day of April, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: James H. Cartwright, chief justice; Alfred M. Craig, justice; Benjamin D. Magruder, justice; Jacob W. Wilkin, justice; Jesse J. Phillips, justice; Joseph N. Carter, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the thirteenth day of April, A. D. 1900, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the criminal court of Cook county in a certain cause entitled in this court Edward S. Dreyer *vs.* The People of the State of Illinois; which said transcript is in the words and figures following, viz:

2 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal-court house, in the city of Chicago, in said county, on the first Monday (being the fifth day) of December, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-third.

Present: Honorable Edmund W. Burke, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.

Attest: PATRICK J. CAHILL, *Clerk.*

Be it remembered, to wit, on the fifth day of December, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

It appearing to the court that public justice requires that a grand jury be selected and summoned for the next term of this court, in accordance with the statute in such case made and provided, the court, of its own motion, doth order that the jury commissioners of Cook county do, at least twenty days before the first day of the next term of this court, select fifty persons possessing the qualifications of jurors required by law, to serve as grand jurors at said term, and that said commissioners shall, within five days after such

3 selection, certify the names of the persons so selected as grand jurors to the clerk of this court, who shall issue and deliver

to the sheriff of Cook county, at least ten days before the next term of this court, a summons, commanding said sheriff to summon the persons so selected, as aforesaid, to appear before this court, at the hour of ten o'clock on the fourth Monday of the next term thereof, to constitute a grand jury for such term.

It is further ordered by the court that the clerk of this court transmit a certified copy of this order to the said jury commissioners forthwith.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of cook county, in said county and State, at a term thereof begun and held at the criminal-court house, in the city of Chicago, in said county, on the first Tuesday (being the third day) of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

Present: Honorable Edmund W. Burke, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.

Attest: PATRICK J. CAHILL, *Clerk.*

4 And afterwards, to wit, on the 23rd day of January, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

The sheriff of Cook county returned into the court the *venire facias* heretofore issued for a grand jury for this term and returnable today, by which it appears that the following-named persons have been duly summoned to appear this day and serve as grand jurors at the present term of this court:

Frederick C. Lensch,
Frank S. Boyden,
Joseph P. Murphy,
James Dullaghan,
Ralph Modjeski,
James T. Mix,
Henry Lundblad,
Richard J. Nash,
Charles H. Holton,
Patrick J. Sexton,
Asa F. Shiverick,
William M. Baker,
Marvin A. Farr,
Henry N. Lehman,
John P. Wood,
Otto Paller,
Michael Dermody,
John C. Kramer,
Horace S. Morris,
Andrew A. Brock,
Charles B. Burgoyur,
Lyman P. Converse,
John C. Kilner, and

who answered to their respective names.

The panel of grand jurors being now filled, the court having now here appointed Marvin A. Farr, Esquire, foreman of said grand jury, the grand jurors aforesaid were duly sworn and charged by the court, and thereupon retired to consider their presentments.

And afterwards, to wit, on the fourth day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in
5 said court; which said proceedings are in the words and figures following, to wit:

The grand jury came into open court and made a presentment, endorsed "A true bill," in the following-entitled cause, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER. } 54041. Indictment for Withholding Funds from Successor in Office.

STATE OF ILLINOIS, *County of Cook,* } *ss.*:

Of the January term of the criminal court of Cook county, in said county and State, in the year of our Lord one thousand eight hundred and ninety-nine.

The grand jurors chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the *the* authority of the People of the State of Illinois, upon their oaths present that before and up to the twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six, in said county of Cook, in the State of Illinois, aforesaid, one Edward S. Dreyer was a certain public officer, to wit, treasurer of the West — park commissioners, the same being a board of public park commissioners appointed by the governor of the said State of Illinois and confirmed by the senate of the said State of Illinois and exercising the powers of corporate authorities in the supervision of public parks and boulevards in and for the town of West Chicago, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois, being duly appointed and qualified as such treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, and duly acting as such treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, and duly authorized by law to collect, receive, safely keep, and disburse the moneys, revenues, bonds, warrants, and funds established by law for public purposes, to wit, the moneys, revenues,
6 bonds, warrants, and funds for the maintainance of public parks and boulevards in the town of West Chicago, a municipal corporation, as aforesaid, required and authorized by law to be placed in the hands and keeping of the said Edward S. Dreyer as such officer, to wit, treasurer of said West Chicago park commis-

sioners, a board of public park commissioners, as aforesaid; that during the time hereinbefore mentioned, to wit, during the time prior to the said twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six, while the said Edward S. Dreyer was so acting as the treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, the said Edward S. Dreyer received as such treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, a large amount of money, revenues, bonds, funds, warrants, and personal property, a more particular discription of which said money, revenues, bonds, warrants, funds, and personal property is to said jurors unknown, of the moneys, revenues, bonds, warrants, funds, and personal property for the maintenance of public parks and boulevards in the town of West Chicago, a municipal corporation, as aforesaid, amounting in all to and of the value of three hundred and sixteen thousand and thirteen dollars and forty cents, lawful money of the United States of America; that one Fred M. Blount was duly appointed and qualified as the successor to said Edward S. Dreyer as said treasurer of the West Chicago park commissioners, a board of public park commissioners, as aforesaid, by the said West Chicago park commissioners, a board of public park commissioners, as aforesaid, on the said twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six, and on said twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six, entered upon and assumed the duties of said office
7 as treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, and has continuously from said twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six, to the present time continued to be such treasurer, as aforesaid, and to act as such treasurer, as aforesaid; that on the twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six, the said Edward S. Dreyer ceased to be such treasurer, as aforesaid, and to act as such treasurer, as aforesaid, and that the said Fred M. Blount, on said twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six, became entitled to and was duly authorized by law to collect, receive, safely keep, and disburse the moneys, revenues, bonds, and funds established by law for the public purposes, to wit, the said moneys, revenues, bonds, warrants, funds, and personal property for the maintenance of public parks and boulevards in the town of West Chicago, a municipal corporation, as aforesaid, required and authorized by law to be placed in the hands and keeping of him, the said Fred M. Blount, as successor, as aforesaid, of said Edward S. Dreyer to said office of treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid; that the said Edward S. Dreyer, late of the county of Cook, on the thirty-first day of January, in the year of our Lord one thousand eight hundred and ninety-nine, in said county of Cook, in the State of Illinois, aforesaid, did unlawfully, feloniously, and willfully fail and refuse to pay and deliver over to

said Fred M. Blount, as such acting treasurer and as such successor in office, to wit, treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, the said large amount of moneys, revenues, bonds, warrants, funds, and personal property, a more particular description of which is to the said jurors unknown, the same then and there being the moneys,
8 revenues, bonds, warrants, funds, and personal property for the maintenance of public parks and boulevards in the town of West Chicago, a municipal corporation, as aforesaid, then and there amounting in all to and of the value of three hundred and sixteen thousand and thirteen dollars and forty cents, lawful money of the United States of America, on demand therefor then and there duly made by the said Fred M. Blount, as such acting treasurer, as aforesaid, and as such successor to said Edward S. Dreyer to the said office of treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, after the said Edward S. Dreyer had ceased to be treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, and after the said Edward S. Dreyer had ceased to act as such treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, and after the said Edward S. Dreyer was authorized by law to act as such treasurer, as aforesaid, and while the said Fred M. Blount, as such acting treasurer, as aforesaid, and as such successor, as aforesaid, of said Edward S. Dreyer as treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, was acting in his said office as treasurer of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, and while the said Fred M. Blount, as such acting treasurer and as such treasurer, as successor of said Edward S. Dreyer, was authorized by law to collect, receive, safely keep, and disburse said moneys, revenues, bonds, warrants, funds, and personal property—a more particular description is to the said jurors unknown—of said West Chicago park commissioners, a board of public park commissioners, as aforesaid, contrary to the statute and against the peace and dignity of the *same* People of the State of Illinois.

CHARLES S. DENEEN,
State's Attorney.

9 Copy. Term No., 3094; P. G. D. No., 54041. Criminal court of Cook county, January term, 1899. The People of the State of Illinois *vs.* Edward S. Dreyer. Indictment for withholding funds from successor in office. A true bill. Marvin A. Farr, foreman of the grand jury. Witnesses: Fred M. Blount, George T. Talty, Edw. T. Noonan, Geo. Greeshield, Frank Baughey, Adolph Berger, Thos. P. Kennedy, Rudolph O. Kahtz, W. S. Beilfeldt, Henry Wilkinson, John C. McNulta, M. F. Mahoney, Carl Mohl, A. B. Greenshield, E. B. Lewis, Frank L. Mean R. H. Wyman, John E. Blount, Pat. Carey, Abe Goodfriend, Mr. Boos, Ernest Schubert, W. D. S. Anderson, Henry W. Kerns, E. B. Lewis. Filed Feb. 4, 1899. Patrick J. Cahill, clerk. B. 5000.

10 And afterwards, to wit, on the fourth day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois vs. EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

Whereupon it is ordered that the people's writ of capias issue against the body of said defendant in the above-entitled cause, returnable forthwith.

Forthwith Capias.

STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you take the body of Edward S. Dreyer, if to be found in your county, and safely him keep, so that you have him before our criminal court of Cook county forthwith, to answer unto the People of the State of Illinois upon an indictment for withholding funds from successor in office, lately preferred against him by the grand jury of said court.

And have you then and there this writ.

Witness Patrick J. Cahill, clerk of our said court, and the [SEAL.] seal thereof, at Chicago, in said county, this 4th day of February, A. D. 1899.

PATRICK J. CAHILL, *Clerk.*

11 Term No., 3094; P. G. D. term, 54041. Criminal court of Cook county, January term, A. D. 1899. Forthwith capias. The People of the State of Illinois *versus* Edward S. Dreyer. Executed this writ by arresting the within-named Edward S. Dreyer and bringing his body into court this 7 day of February, A. D. 1899.

Fees.

Arrest	$2 00
Mileage	10
Return	10
Total	$2 20

Rec'd from the clerk at 11 o'clock a. m., Feb. 6, 1899. Ernest J. Magerstadt, sheriff. Ernest J. Magerstadt, sheriff, by John A. Kunz, deputy. Bail, $5,000.

12 And afterwards, to wit, on the fourth day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER. } 54041. Indictment for Withholding Funds from Successor in Office.

On motion of Charles S. Deneen, State's attorney, it is ordered that the said defendant be held to bail in the penal sum of five thousand ($5,000.00) dollars, with good and sufficient sureties, to be approved by this court, and in default thereof he be remanded into the custody of the sheriff of cook county.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *Cook County,* } *ss.:*

Pleas before a branch of the criminal court of Cook county, said county and State, at a term thereof begun and held at the criminal-court house, in the city of Chicago, in said county, on the first Monday (being the sixth day) of February, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

Present: Honorable Richard W. Clifford, judge of the circuit court of Cook county and *ex officio* judge of the criminal
13 court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.
Attest: PATRICK J. CAHILL, *Clerk.*

And afterwards, to wit, on the seventh day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS *vs.* EDWARD S. DREYER, JOHN C. WALZ, Clara C. Berger, Charlotte Belligman. } No. 54041. Recognizance.

This day come Edward S. Dreyer, as principal, and John C. Walz, Clara C. Berger, and Charlotte Belligman, as suret-, and severally acknowledged themselves to owe and be indebted unto the People of the State of Illinois in the penal sum of five thousand dollars, to be levied of their goods and chattels, lands and tenements, respectively; yet to be void on the condition that the said Edward S.

Dreyer shall personally be and appear before the criminal court of Cook county, now in session, on the 8th day of February, A. D. 1899, and from day to day and from term to term, and from day to day of each term, until the final sentence or order of said court, to answer unto the People of the State of Illinois, upon an indictment for withholding funds from successor in office, now pending in said court against him, and abide the order of said court and — depart the same without leave; otherwise to be and remain in full force and effect.

14 STATE OF ILLINOIS, } ss:
Cook County, }

I, Patrick J. Cahill, clerk of the criminal court of Cook county, in said county and State, do hereby certify the above and foregoing to be a true, perfect, and complete copy of a recognizance entered of record on the — day of ——, A. D. 189–, in a certain cause — pending in said court, wherein The People of the State of Illinois, plaintiffs and —— ——, defendant.

Witness Patrick J. Cahill, clerk of said court, and the seal thereof, at Chicago, in said county, this — day of ——, A. D. 189–.

—— ——, *Clerk.*

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal-court house, in the city of Chicago, in said county, on the first Monday (being the third day) of July, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

Present: Honorable Joseph E. Gary, judge of the superior court of Cook county and *ex officio* judge of criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.

Attest: PATRICK J. CAHILL, *Clerk.*

15 And afterwards, to wit, on the 25th day of July, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER. } 54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person

as by his counsel, also comes, and the said defendant, by his counsel, now here moves the court for a change of venue from the honorable Joseph E. Gary, judge of the superior court of Cook county and *ex officio* judge of the criminal court of Cook county, and from the Honorable Charles G. Neely, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county; and the court, hearing counsel in support of said motion and being fully advised in the premises, doth sustain said motion and doth order that the venue be, and the same is hereby, changed to the Honorable Arba N. Waterman, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county.

16 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } *ss.*:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal-court house, in the city of Chicago, in said county, on the first Monday (being the third day) of July, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

Present: Honorable Arba N. Waterman, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.

Attest: PATRICK J. CAHILL, *Clerk.*

And afterwards, to wit, on the 25th day of July, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER. } 54041. Indictment for Withholding Funds from Successor in Office.

17 This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and the said defendant, by his counsel, now here files his plea of former jeopardy.

And afterwards, to wit, on the 26th day of July, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proce-dings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and the State's attorney now here moves the court to strike from the files the defendant's plea of former jeopardy, heretofore entered and filed in this cause; and the court, hearing counsel in support of said motion as well as in opposition thereto and being fully advised in the premises, doth sustain said motion and order that the defendant'- plea of former jeopardy be, and the same is hereby, stricken from the files in this cause.

To which ruling of the court the said defendant, by his counsel, now here excepts.

And counsel for said defendant now here moves the court to quash the indictment in this cause.

And the court, hearing counsel in support of said motion as well as in opposition thereto and being fully advised in the premises, doth overrule said motion and order that said motion to quash be, and the same is hereby, overruled accordingly; to which order of the court in overruling said motion the said defendant, by
18 his counsel, now here excepts.

And the said defendant, having been furnished with a copy of the indictment in this cause and lists of the names of the witnesses and jurors, and he being now here duly arraigned and forthwith demanded of and concerning the crime alleged against him in said indictment, how he will acquit himself thereof, for a plea in that behalf says that he is not guilty in manner and form as charged therein, and of this he put- himself upon the country; and the said People do the like.

And counsel for said defendant now here moves the court for a continuance in this cause; and the court, hearing counsel in support of the motion as well as in opposition thereto and being fully advised in the premises, doth sustain said motion and orders that this cause be, and the same is hereby, continued.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal-court house, in the city of Chicago, in said county, on the first Monday (being the seventh day) of August, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

Present: Honorable Elbridge Hanecy, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of
19 Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.
Attest: PATRICK J. CAHILL, *Clerk.*

And afterwards, to wit, on the 29th day of August, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER. } 54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and the said defendant, by his counsel, now here moves the court for a change of venue from the Honorable Elbridge Hanecy, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county.

And the court, hearing counsel in support of said motion as well as in opposition thereto and being fully advised in the premises, doth overrule said motion and orders that said motion be, and the same is hereby, overruled accordingly.

To which order of the court in overruling said motion the said defendant, by his counsel, now here excepts.

And the said defendant, by his counsel, now here objects to the jurisdiction of the court; and the court, hearing counsel in support of said objection as well as in opposition thereto and being fully advised in the premises, doth overrule said objection and
20 orders that said objection be, and the same is hereby, overruled accordingly.

To which order of the court in overruling said objection said defendant, by his counsel, now here excepts.

And now, issue being joined, it is ordered that a jury come.

And counsel now proceed to the selection of a jury for the trial of this cause, and

William P. Swift,	Benjamin Welham,
Frank Hook,	Marson French,
William T. Van Pinnon,	Charles A. Kuhn,
Herbert E. Stover,	Thomas H. Miller

having been selected and sworn, and it appearing to the court that more jurors will be necessary for the trial of this cause—

The court, of its own motion, doth order the clerk of this court to proceed to the office of the jury commissioners and there draw fifty names of persons possessing the qualifications of jurors, to be summoned by the sheriff of Cook county to appear at nine thirty o'clock tomorrow morning to fill the panel of jurors for the trial of this cause.

And the hour of adjournment having arrived, it is ordered that the further selection of a jury and consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock tomorrow morning.

And in the meantime the aforesaid eight jurors remain in charge of sworn officers of this court, to be by them kept together and returned at the hour last aforesaid.

And afterwards, to wit, on the 30th day of August, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

21

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney; and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the eight jurors heretofore selected and sworn; and counsel now proceed to the further selection of a jury for the trial of this cause; and

William F. Maywom and Albert J. Brookfelt having been selected and sworn, and the regular venire being now exhausted, and the sheriff of Cook county — returned into court the special venire heretofore issued out of this court and returnable this day, counsel now proceed to the further selection of a jury for the trial of this cause; and

Frank L. Fry and William H. Collins having been selected and duly sworn, the panel of jurors for the trial of this cause *being* now filled.

And the aforesaid jury hearing part of the testimony of witnesses, and the hour of adjournment having arrived, it is ordered that the

further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock tomorrow morning, and in the meantime the aforesaid jury — remain in charge of sworn officers, to be — them kept together and returned into court at the hour last aforesaid.

And afterwards, to wit, on the 31st day of August, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

22

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the jurors of the jury aforesaid, and the aforesaid jury, hearing the further testimony of witnesses—

And counsel for said defendant now here moves the court to instruct the jury to return a verdict of not guilty.

And the court, hearing counsel in support of said motion as well as in opposition thereto and being fully advised in the premises, doth overrule said motion and order that said motion be, and the same is hereby, overruled accordingly.

To which order of the court in overruling said motion the said defendant, by his counsel, now here excepts.

And, the hour of adjournment having arrived, it is ordered that the further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at nine o'clock to-morrow morning.

And in the meantime the aforesaid jury remain in charge of sworn officers, to be by them kept together and returned at the hour last aforesaid.

And afterwards, to wit, on the first day of September, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

23

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person

as by his counsel, also comes; and also come the jurors of the jury aforesaid, and the aforesaid jury, hearing the arguments of counsel and instructions of the court, retire in charge of sworn officers to consider of their verdict.

And afterwards, to wit, on the second day of September, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the jurors of the jury aforesaid, being now returned into court, and, being unable to agree upon a verdict, are thereupon by order of this court discharged from further consideration of this cause.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal-court house, in the city of Chicago, in said county, on the first Monday (being the fifth day) of February, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Present: Honorable Arba N. Waterman, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.

Attest: PATRICK J. CAHILL, *Clerk.*

And afterwards, to wit, on the 19th day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

25 And counsel for said defendant now here enters and files his plea of former jeopardy in this cause.

The State's attorney now here moves the court to strike from the files the defendant's plea of former jeopardy, entered and filed in this cause.

And the court, hearing the arguments of counsel in support of said motion as well as in opposition thereto and being now fully advised in the premises, doth sustain said motion and orders that the plea of former jeopardy be, and the same is hereby, stricken from the files in this cause.

And now, issue being joined, it is ordered that a jury come.

And counsel now proceed to select a jury for the trial of this cause; and, none being selected and the hour of adjournment having arrived, it is ordered that the further selection of a jury and the consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock tomorrow morning.

And afterwards, to wit, on the 20th day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And counsel now proceed to the further selection of a jury for the trial of this cause, and

26

William B. Comstock,	Harry R. Adams,
James T. Clutter,	Louis Scharkopf,
William G. Wood,	William J. Wright,
Anton Kovar, and	Albert H. Bush

were selected and sworn; and, the hour of adjournment having arrived, it is ordered that the further selection of a jury and consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock tomorrow morning.

And it is further ordered by the court that during each adjournment of this court during the trial of this cause the jurors remain in charge of sworn officers of this court, to be by them kept together and returned into court at the hour ordered pursuant to adjournment.

And afterwards, to wit, on the 21st day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the eight jurors heretofore selected and sworn herein, and counsel proceed to the further selection of a jury for the trial of this cause, and

Blair W. Dibble, Peter A. Johnson,
John Jurgenson, and Mackey D. McAvoy

27 were selected and sworn; and, the panel of jurors for the trial of this cause being now filled and the aforesaid jury hearing part of the testimony of witnessess and the hour of adjournment having arrived, it is ordered that the further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock tomorrow morning.

And afterwards, to wit, on the 22nd day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the jurors of the jury aforesaid; and, the aforesaid jury hearing the further testimony of witnesses and the hour of adjournment having arrived, it is ordered that the further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock tomorrow morning.

And afterwards, to wit, on the 23rd day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record; which said proceedings are in the words and figures following, to wit:

28

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the jurors of the jury aforesaid; and, the aforesaid jury hearing the further testimony of witnesses and the hour of adjournment having arrived, it is ordered that the further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock tomorrow morning.

And afterwards, to wit, on the 24th day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the jurors of the jury aforesaid; and, the aforesaid jury hearing the further testimony of witnesses and the hour of adjournment having arrived, it is ordered that the further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock Monday morning, February 26th, A. D. 1900.

29 And afterwards, to wit, on the 26th day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois vs. EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also come.

And also come the jurors of the jury aforesaid; and counsel for said defendant now here moves the court to discharge the said defendant on the ground that he has been once in jeopardy, and the court, hearing the arguments of counsel in support of said motion as well as in opposition thereto and being now fully advised in the premises, doth overrule said motion and order that said motion be, and the same is hereby, overruled accordingly; to which order of the court in overruling said motion the said defendant, by his counsel, now here excepts.

Counsel for said defendant now here moves the court to amend the record of the previous trial of this cause by striking out the word- "being unable to agree."

And the court, hearing the arguments of counsel in support of said motion as well as in opposition thereto and being now fully advised in the premises, doth overrule said motion and orders that said motion be, and the same is hereby, overruled accordingly; to which order of the court in overruling said motion said defendant, by his counsel, now here excepts.

And the aforesaid jury hearing the further testimony of witnesses and the hour of adjournment having arrived, it is ordered that the further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock tomorrow morning.

And afterwards, to wit, on the 27th day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois vs. EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the jurors of the jury aforesaid; and, the aforesaid jury hearing the further testimony of witnesses and part of the arguments of counsel and the hour of adjournment having arrived, it is ordered that the further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock tomorrow morning.

And afterwards, to wit, on the 28th day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	Indictment for Withholding Funds from Successor in Office.

31 This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the jurors of the jury aforesaid; and the aforesaid jury, hearing the further arguments of counsel and instructions of the court, retire in charge of sworn officers to consider of their verdict.

Ordered that this branch of this court do now take a recess.

And afterwards, to wit, on the first day of March, in the year last aforesaid, it being the term of the court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And also come the jurors of the jury aforesaid in charge of sworn officers of this court; and the aforesaid jury, for a verdict, say:

"We, the jury, find the defendant, Edward S. Dreyer, guilty of failure to pay over money to his successor in office, in manner and form as charged in the indictment, and we fix the amount thereof to be three hundred and sixteen thousand dollars, and we fix his punishment at imprisonment in the penitentiary."

And counsel for said defendant now here moves the court for a new trial in this cause.

32 And afterwards, to wit, on the 10th day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And the court, hearing counsel in support of the motion for a new trial heretofore entered herein as well as in opposition thereto and being not fully advised in the premises, doth order that the further consideration of this cause be, and the same is hereby, continued until Thursday, the 15th day of March, A. D. 1900.

And afterwards, to wit, on the 15th day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER.	54041. Indictment for Withholding Funds from Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And the court, being now fully advised in the premises, doth overrule said motion for a new trial heretofore entered herein,
33 and orders that said motion for a new trial in this cause be, and the same is hereby, overruled accordingly.

To which order of the court in overruling said motion the defendant, by his counsel, now here excepts.

And counsel for said defendant now here enters and files his motion in arrest of judgment in this cause.

And the court, hearing counsel in support of said motion as well as in opposition thereto and being now fully advised in the premises, doth overrule said motion and orders that said motion in arrest of judgment be, and the same is hereby, overruled accordingly.

To which order of the court in overruling said motion the said defendant, by his counsel, now here excepts.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal-court house, in the city of Chicago, in said county, on the first Monday (being the fifth day) of March, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Present: Honorable Arba N. Waterman, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.
Attest: PATRICK J. CAHILL, *Clerk.*

Be it remembered, to wit, on the fifteenth day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE of Illinois *vs.* EDWARD S. DREYER. } 54041. Indictment for Failure to Pay Over Money to His Successor in Office.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes, and now neither the said defendant
35 nor his counsel for him saying anything further why the judgment of the court should not now be pronounced against him on the verdict of guilty heretofore rendered to the indictment in this cause:

Therefore it is ordered and adjudged by the court that the said defendant, Edward S. Dreyer, be, and he hereby is, sentenced to the penitentiary of this State, at Joliet, for the crime of failure to pay over money to his successor in office, whereof he stands convicted; and it is further ordered and adjudged that the said defendant, Edward S. Dreyer, be taken from the bar of the court to the common jail of Cook county, and from thence by the sheriff of Cook county to the penitentiary of this State, at Joliet, and be delivered to the warden or keeper of said penitentiary; and the said warden or keeper is hereby required and commanded to take the body of the said defendant, Edward S. Dreyer, and confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof, until discharged by the State board of pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced.

It is further ordered that the said defendant pay all the costs of these proceedings and that execution issue therefor.

And thereafter, on the 19th day of March, 1900, there was filed in said cause a certain bill of exceptions in words and figures as follows, to wit:

36 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS }
vs. } P. G. D., 54041.
EDWARD S. DREYER. }

Bill of Exceptions.

Be it remembered that at the February, A. D. 1900, term of the criminal court, before a branch thereof presided over by the Honorable Arba N. Waterman, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county, and then and there presiding over one of the branches of said criminal court of Cook county, the following proceedings were had and taken, and the said Honorable Arba N. Waterman, judge of said court, as aforesaid, now hereby certifies that on February 19, A. D. 1900, in said February term of said criminal court, as aforesaid, there was called for trial before him said above-entitled case, and that upon said case being called there were present, and representing the People of the State of Illinois, Charles S. Deneen, State's attorney, and Albert C. Barnes, assistant State's attorney, and that there were present said defendant in his own person and by Thomas A. Moran and Alfred S. Austrian, his attorneys.

The court further certifies that thereupon, by leave of court first had and obtained, said defendant presented and filed his plea of former jeobardy; which said plea was and is in words and figures as follows, to wit:

37 STATE OF ILLINOIS, } ss:
Cook County, }

In the Criminal Court of Cook County, in the February Term, A. D. 1900.

EDWARD S. DREYER }
ads. } P. G. D., No. 54041.
PEOPLE OF THE STATE OF ILLINOIS. }

And the said Edward S. Dreyer, defendant, in his own proper person, comes into court and, having heard the said indictment read, says:

That the said People of the State of Illinois ought not further to prosecute the said indictment against him, said defendant, Edward

S. Dreyer, because he says that heretofore, on August 29, 1899, before the Honorable Elbridge Hanecy, one of the judges of the circuit court of Cook county, and *ex officio* judge of the criminal court of Cook county, then and there holding a branch of said criminal court of said Cook county, the People of the State of Illinois being present and represented by Charles S. Deneen, State's attorney, and said defendant, Edward S. Dreyer, being present in his own proper person and by his counsel, all in said criminal court of Cook county, and at a regular term thereof, properly begun and holden at the criminal-court house, in the city of Chicago, on the first Monday of August, 1899, a jury of jurors composed of the following-named persons, namely, William P. Swift, Frank Hook, William T. Vanpinnon, Herbert E. Stover, Benjamin Welham, Marson French, Charles A. Kuhn, Thomas H. Miller, William F. Maywon, Albert J. Brookfelt, Frank L. Fry, and William H. Collins, was then and there duly called, and said jurors did then and there answer
to their names respectively, and were then and there duly
38 sworn and impaneled to try said defendant, Edward S. Dreyer,
upon the indictment herein between the People of the State of Illinois and the said defendant, Edward S. Dreyer, under and in conformity with the laws of said State of Illinois and the statutes thereof in such cases made and provided, and thereupon from day to day evidence was heard and produced in said court to said court and said jurors in the trial of said cause, which said evidence was produced for and on behalf of said People of the State of Illinois and said defendant, Edward S. Dreyer, and divers witnesses for and on behalf of said People of the State of Illinois, who were then and there duly sworn, gave evidence to the said court and to the said jury so sworn and impaneled touching the supposed felony set forth in said indictment herein, and then and there during the progress of said trial witnesses were then and there duly sworn, who then and there gave evidence to the said court and to the said jury so sworn and impaneled on behalf of said defendant, Edward S. Dreyer.

And said defendant, Edward S. Dreyer, further says that the trial of said cause upon said indictment herein proceeded from day to day before said court and said jury until the first day of September, 1899, upon which said day, at the convening of court, arguments were made to said jury on behalf of said People of the State of Illinois by Charles S. Deneen, State's attorney, and Albert C. Barnes, assistant State's attorney, and arguments were made to said jury on behalf of said defendant, Edward S. Dreyer, by Alfred S. Austrian and William S. Forrest, attorneys for said defendant, Edward S. Dreyer, and after the close of said arguments and after the jury had heard the same the court instructed the jury as to the law in said case, and at the hour of four o'clock in the afternoon of said day (being September 1st, 1899) said jury retired in charge of the sworn officers of said court to consider their verdict.

39 Defendant further says that at the hour of 4.55 in the afternoon of said day (September 1st, 1899) said jury took a ballot upon the guilt or innocence of said defendant, Edward S. Dreyer, and said ballot resulted in six of said jurors voting in favor of the

guilt of said defendant and six of said jurors voting in favor of the innocence of said defendant; that after said first ballot four other ballots were taken, the last of which was taken at 9.45 p. m. of said September 1st, 1899, each of which said ballots resulted in six of said jurors voting in favor of the guilt of said defendant, Edward S. Dreyer, and six of said jurors voting in favor of the innocence of said defendant.

Defendant further says that at 11.20 p. m. of said day a sixth ballot was taken upon the guilt or innocence of said defendant, Edward S. Dreyer, which resulted in five of said jurors voting in favor of the guilt of said defendant and seven of said jurors voting in favor of the innocence of said defendant, Edward S. Dreyer; that up to 1.45 a. m. of September 2, 1899, three other ballots were taken by said jurors with the same result.

Defendant further says that thereafter, and at 2.35 a. m., another and further ballot was taken by said jurors, which resulted in four of said jurors voting for the guilt of said defendant, Edward S. Dreyer, and eight of said jurors voting in favor of the innocence of said defendant, Edward S. Dreyer.

Defendant further says that thereafter, at 3.20 a. m., another and further ballot was taken by said jurors, which resulted in three of said jurors voting in favor of the guilt of said defendant, Edward S. Dreyer, and nine of said jurors voting in favor of the innocence of said defendant, Edward S. Dreyer; that thereafter, and between the hours of 3.20 a. m. and 8.50 a. m., eight other and further ballots were taken by said jurors, each of said ballots resulting in three of said jurors voting in favor of the guilt of said defendant, Edward S. Dreyer, and nine of said jurors voting in favor of the innocence of said defendant, Edward S. Dreyer.

Defendant further says that said court stood adjourned by the order of said Honorable Judge Hanecy from the hour of 4.30 p. m. of said September 1st, 1899, to the hour of 9.30 a. m. of said September 2, 1899.

Defendant further says that at 9.30 a. m. on said September 2, 1899, said Honorable Judge Hanecy entered the court-room in which the trial of said cause had theretofore been had, and stated to the attorneys for said defendant, Edward S. Dreyer, who were then and there representing said defendant—said defendant, Edward S. Dreyer, being then and there present in court—that he, said Judge Hanecy, had been informed by his bailiff that said jury had not as yet agreed upon a verdict, and that he, said judge, was going to call in said jury and discharge the same; that William S. Forrest, one of the attorneys for said defendant, Edward S. Dreyer, then and there asked said court the reason for discharging said jury at that time, and stated to said court that he objected on behalf of said defendant to said court discharging said jury; that thereupon said court instructed the sworn officer in charge of said jury to bring said jury into the court-room; that thereupon said twelve jurors hereinbefore mentioned were brought into said court-room by said officer and took their respective seats in the jury-box; that thereupon said court stated to said jurors that they were discharged from further consid-

eration of said cause, referring to said indictment herein; that to said instruction thus given to said jury and to the discharge of said jury from the further consideration of said cause said defendant, Edward S. Dreyer, earnestly objected and excepted, and his said attorneys stated to said court that there was no moral, physical necessity for discharging said jury.

41 Defendant further says that at the time of the giving of said instruction by said court said court and jurors were in good physical condition, and the said court did not discharge said jury from the consideration of said cause by reason of any fatality or misconduct on the part of said jurors or any one with reference to said jury or upon the request of him, the said defendant, Edward S. Dreyer, or upon the request of said jurors or any of them, or for or by reason of any fatality of them, the said jurors so sworn and impaneled as last aforesaid, or any of them, or of the said judge, or of either of them, or for or by reason of any other sufficient or legal cause or of any overruling necessity whatsoever, or for the reason that there was no probability that said jury might not reach a verdict in said cause; that at the time of giving such instruction, as aforesaid, by said court said court did not have before it any sufficient or legal evidence as to how said jury stood, or whether or not there was any probability of said jury reaching a verdict.

And the said defendant, Edward S. Dreyer, further says that he is now called upon again to answer said indictment, and that said defendant, Edward S. Dreyer, is the same defendant Edward S. Dreyer so tried as aforesaid, and that said indictment which he is now called upon to answer is the same indictment hereinbefore referred to and pending herein; that by reason of said defendant now being again called upon to answer to said indictment and to stand another trial thereunder he will be, and now is, twice put in jeopardy for the same offense, contrary to the constitution and the laws of said State of Illinois; all of which said defendant, Edward S. Dreyer, is ready to verify.

Wherefore he prays judgment, and prays that by this honorable court he may be dismissed and discharged from the said indictment herein specified.

EDWARD S. DREYER.

42 STATE OF ILLINOIS, } ss:
Cook County, }

In the Criminal Court of Cook County, to the February Term, A. D. 1900.

EDWARD S. DREYER *ads.* PEOPLE OF THE STATE OF ILLINOIS. } P. G. D., No. 54041.

Edward S. Dreyer, being first duly sworn, upon oath deposes and says that he is the said Edward S. Dreyer who has signed the above and foregoing plea, and that he knows the contents thereof, and that the same is true in substance and in fact.

EDWARD S. DREYER.

Subscribed and sworn to before me, a notary public, this 17th day of February, A. D. 1900.

[NOTARIAL SEAL.] CARRY W. RHODES,
Notary Public, Cook County, Illinois.

That thereupon the State's attorney, on behalf of the People, made a motion to strike said plea of former jeopardy from the files of said case; and the court, having heard arguments of counsel in support of said motion as well as in opposition thereto, sustained said motion and ordered that said plea be stricken from the files; to which order said defendant then and there duly objected and excepted.

That thereupon issue was again joined in said case between
43 said People of the State of Illinois and said defendant, Edward S. Dreyer, and the court thereupon ordered that a jury come to try said issue.

That thereupon said State's attorney and the attorneys for said defendant proceeded to examine said jury; but no jurors were accepted or sworn to try said issues or said case up to the hour of adjournment, and the court thereupon ordered that the further selection of a jury and the consideration of said case be postponed until the opening of court on February 20, 1900.

That thereupon, upon said February 20, A. D. 1900, said State's attorney and the attorneys for said defendant again proceeded to the selection of a jury for the trial of said case; that thereupon William B. Comstock, Harry R. Adams, James T. Clutter, and Louis Scharkopf were duly accepted by said State's attorney and by the attorneys for said defendant, and were thereupon sworn to try the issues in said case between The People of the State of Illinois and said defendant, Edward S. Dreyer, by Henry C. McFall, a duly acting minute clerk of said branch of the criminal court presided over by said judge, as herein stated.

That said Henry C. McFall was, on said February 19, A. D. 1900, and each day thereafter up to and including March 1, 1900, a duly qualified and acting minute clerk in said branch of the criminal court presided over by Judge Waterman.

That on February 19, A. D. 1900, and at all times during the said term and during the trial of said case, and up to the time of the discharge of the jury in said case, S. A. Goss and Alfred Goranson were the only bailiffs or officers having charge of said jury; that in the afternoon of February 20, 1900, four other jurors were accepted, selected, and sworn to try said defendant in said case, said jurors being William G. Wood, William J. Wright, Anton Kovar, and Albert H. Bush.

44 That on February 21, 1900, four other jurors were accepted, selected, and sworn to try said case, being Blair W. Dibble, Peter A. Johnson, John Jurgenson, and Mackey D. McAvoy, and that upon the selection of said last-named four jurors the panel of jurors for the trial of said case was filled.

That thereafter, on said February 21, A. D. 1900, after the selection, acceptance, and swearing of said last-named four jurors, and

from day to day thereafter, and on said February 21st, and on February 22nd, 23rd, 24th, 26th, and 27th, A. D. 1900, said jurors heard the proceedings in said case, said proceedings being hereinafter fully set forth; that during part of the day of February 27, 1900, and on February 28, 1900, said jurors heard the arguments of said State's attorneys and said attorneys for said defendant and the instructions of the court, which are hereinafter set forth, and that after the giving by said court of said instructions to said jury said jury retired in charge of said Goss and Goranson, to consider their verdict.

That on March 1, A. D. 1900, at about 10 o'clock, said jurors were brought into court by said Goss and Goranson; that thereupon they announced that they had agreed upon their verdict and delivered said verdict to said clerk, McFall, and that said verdict was in words and figures as follows, to wit:

"We, the jury, find the defendant, Edward S. Dreyer, guilty of the failure to pay over money to his successor in office, in manner and form as charged in the indictment, and we fix the amount thereof to be $316,000, and we fix his punishment at imprisonment in the penitentiary."

The court further certifies that after said jury returned their said verdict into court they were thereupon discharged from further service as jurors, and that said jury thereupon forthwith separated.

45 The court further certifies that at all times during the trial of said case, when said jurors were not present in court, they were in the sole charge and custody of said Goss and Goranson and in the charge of no other officer or parties, and that during the entire trial of said case and at the time of the discharge of said jury said Henry C. McFall was a clerk of said criminal court of Cook county, acting as clerk in said branch of the criminal court, and that there was in said branch no other clerk or minute clerk during the time hereinbefore stated, excepting said Henry C. McFall, who entered any orders or minutes in said case herein.

The court further certifies that on March 1, A. D. 1900, upon said verdict being returned into court, said defendant then and there objected to said verdict and made his motion for a new trial; which said motion for a new trial was then and there duly entered of record.

The court further certifies that thereafter and on March 10, A. D. 1900, the said defendant filed his written motion for a new trial, which said written motion for a new trial is hereinafter set forth; that upon the filing of said written motion for a new trial the same was argued and each and every of the points therein mentioned were urged by said defendant for a new trial.

The court further certifies that, in support of said motion for a new trial and of the grounds therein mentioned, said defendant filed the affidavits of Fred K. Buckminster, Henry C. McFall, and the two affidavits of Alfred S. Austrian; that in opposition to said affidavits said State's attorney filed the affidavits of Sanford A. Goss, Albert Goranson, and Albert C. Barnes; that in rebuttal of said affidavits so filed by said State's attorney said defendant took the testi-

mony in open court of said Henry C. McFall; that said affidavits so filed by said defendant are in words and figures as follows, to wit:

46 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS
vs.
EDWARD S. DREYER. } P. G. D., 54041.

Fred K. Buckminster, being first duly sworn, on oath deposes and says that he is of lawful age, and now is and for more than ten years last past has been a resident and citizen of the city of Chicago, in said county and State aforesaid.

Affiant further says that on February 19th, 1900, before the Honorable Arba N. Waterman, one of the judges of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county, said case herein was called for trial, and it was ordered that a jury come to try the issues between the People of the State of Illinois and said defendant, Edward S. Dreyer, but that no jurors were selected or sworn in said cause to try such issues upon said day; that upon the morning of February 20, 1900, four jurors were accepted and sworn to try the issues in said case; that said four jurors were Harry R. Adams, William B. Comstock, Louis Scharkopf, and James T. Clutter; that upon said four jurors being selected and sworn to try said issues between the People of the State of Illinois and said defendant, Edward S. Dreyer, and the noon adjournment of said court having arrived, immediately preceding said noon adjournment the said clerk administered an oath to S. A. Goss and Alfred Goranson, who were then acting and who were the only acting bailiffs or officers of said court during said trial, and at all times in charge of the jurors of the jury in said case herein.

That thereupon said four jurors retired in charge of said
47 bailiffs; that said oath so administered to said bailiffs was administered when said four jurors were sworn, and no oath was administered to said bailiffs thereafter; that thereafter and upon said 20th day of February, 1900, four other jurors were accepted, selected, and sworn to try said case, namely, William G. Wood, William J. Wright, Anton Kovar, and Albert H. Bush; that thereafter and upon the 21st day of February, 1900, four other jurors were accepted, selected, and sworn to try said issues, namely, Blair W. Dibble, Peter A. Johnson, John Jurgerson, and Mackey D. McAvoy, and that the panel of jurors for the trial of said case was thereby filled; that no oath of any kind was administered to said bailiffs at any time during said trial other than the said oath which is hereinbefore referred to, which was administered, as aforesaid, on said February 20th, 1900, and at no other time during the trial of said case up to and including the time of the retirement of the jury to consider their verdict in said case, or up to the time of the dis-

charge of said jury upon March 1, 1900, after verdict in said case; which verdict was rendered upon said date last aforesaid; that at all times form the beginning of said trial up to the bringing in of the verdict in said case and the discharge of the said jurors and jury this affiant was present in court on each day during the entire trial of said case and when the jury retired to consider their verdict and when they returned the same before the Honorable Judge Waterman, sitting in said criminal court, as aforesaid.

Affiant further says that on February 28th, 1900, said jurors heard the arguments of said State's attorney and said attorneys for said defendant and the instructions of the court, and after the giving of said instructions to said jury said jury retired in charge of said Goss and Goranson to consider their verdict.

That upon said February 28th, 1900, at about the hour of
48 5 o'clock p. m., said branch of said criminal court before which said case was adjourned to reconvene on March 1, 1900, at 10 o'clock a. m.; that at the time of said adjournment said jurors were still considering their verdict in charge of said Goss and Goranson as such officers; that at about 7 o'clock p. m. on said February 28, 1900, said jurors had not signed, sealed, or returned their said verdict; that at said hour said jury, in charge of said Goss and Goranson, left said jury-room where they were considering their verdict and proceeded through the public highway on foot to the hotel at which they had been and were stopping during the trial of said case, several blocks distant from said jury-room in said criminal-court building, and said jurors there remained during the night.

That on March 1, 1900, at about nine o'clock in the morning of said day, said jurors were returned into their said jury-room by said Goss and Goranson; that at about 10 o'clock on the morning of said March 1, 1900, said jurors having agreed, they were brought into court by said Goss and Goranson; that thereupon they announced that they had agreed, and delivered their sealed verdict; which said verdict was in words and figures as follows, to wit:

"We, the jury, find the defendant, Edward S. Dreyer, guilty of failure to pay over money to his successor in office in manner and form as charged in the indictment, and we fix the amount thereof to be three hundred and sixteen thousand dollars, and we fix his punishment at imprisonment in the penitentiary."

That thereupon the said jury was discharged from further services as jurors, and said jury thereupon separated.

And further affiant sayeth not.

(Signed) FRED K. BUCKMINSTER.

Subscribed and sworn to before me this 8th day of March, 1900.

ALFRED S. AUSTRIAN,

[SEAL.] *Notary Public.*

49 P. G. D., 54041. Criminal court of Cook county. People of the State of Illinois *vs.* Edward S. Dreyer. Affidavit of Fred K. Buckminster. Filed March 10, 1900. Patrick J. Cahill, cl'k. Moran, Mayer & Meyer, attorneys and counselors, Unity building, Chicago.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of said Cook County.

PEOPLE OF THE STATE OF ILLINOIS }
vs.
EDWARD S. DREYER. }

Henry C. McFall, being first duly sworn, upon oath deposes and says that on February 19th, 1900, he was the duly qualified and acting minute clerk in the criminal court of Cook county, assigned to and acting as such minute clerk, before the
50 Honorable Arba N. Waterman, one of the judges of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county; that on said date last aforesaid issue was joined between the People of the State of Illinois and Edward S. Dreyer in case No. 54041 before said Honorable Judge Waterman; that on said day and date it was ordered that a jury come to try the issues between the People of the State of Illinois and said defendant, Edward S. Dreyer, but no jurors were selected or sworn in said cause to try such issues upon said day; that upon the morning of February 20, 1900, four jurors were accepted and sworn to try the issues in said case; that said four jurors were Harry R. Adams, William B. Comstock, Louis Scharkopf, and James T. Clutten; that upon said four jurors being selected and sworn to try said issues between the People of the State of Illinois and said defendant, Edward S. Dreyer, and the noon adjournment of said court having arrived, immediately preceding said noon adjournment the said clerk administered the following oath to S. A. Goss and Alfred Goranson, and then and at all times herein mentioned acting bailiffs and officers of said court, which said oath was as follows:

"You and each of you do solemnly swear by the ever-living God that you will take care of this jury according to law, so help you God."

That thereupon said four jurors retired in charge of said bailiffs; that said oath so administered to said bailiffs was administered when said four jurors were sworn, and no oath was administered to said bailiffs thereafter; that thereafter and upon said 20th day of February, 1900, four other jurors were accepted, selected, and sworn to try said case, namely, William G. Wood, William J. Wright, Anton Kovar, and Albert H. Bush; that thereafter and upon the 21st day of February,
1900, four other jurors were accepted, selected, and sworn to try
51 said issues, namely, Blair W. Dibble, Peter A. Johnson, John Jurgenson, and Mackey D. McAvoy, and that the panel of jurors for the trial of said case was thereby filled; that no oath of any kind was administered to said bailiffs at any time during said trial other than the said oath which is hereinbefore set forth and which was administered, as aforesaid, on said February 20th, 1900, and at no other time during the trial of said case up to and including the time of the retirement of the jury to consider their verdict in said case or up to the time of the discharge of said jury upon March 1, 1900,

after verdict in said case, which verdict was rendered upon said date last aforesaid; that at all times from the beginning of said trial up to the bringing in of the verdict in said case and the discharge of the said jurors and jury this affiant was acting as such minute clerk before the Honorable Judge Waterman, sitting in said criminal court, as aforesaid, and that no other minute clerk was present or acting as clerk in said court; and further affiant saith not.

(Signed) HENRY C. McFALL.

Subscribed and sworn to before me, a notary public, this third day of March, 1900.

ALFRED S. AUSTRIAN,
[SEAL.] *Notary Public.*

52 G. No., 54041; T. No., —. — court of Cook county. People of the State of Illinois *vs.* Edward S. Dreyer. Affidavit of Henry C. McFall. Filed March 10, 1900. Patrick J. Cahill, cl'k. Moran, Mayer & Meyer, attorneys and counselors, Unity building, Chicago.

STATE OF ILLINOIS, } ss.
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS }
vs. } P. G. D., 54041.
EDWARD S. DREYER. }

Alfred S. Austrian, being first duly sworn, on oath deposes and says that he is now and for about seven years last past has been a duly authorized and practicing attorney in the State of Illinois and practicing law in the city of Chicago, in said State; that he
53 is a member of the law firm of Moran, Mayer & Meyer, who are the attorneys for the defendant, Edward S. Dreyer, and with Thomas A. Moran, senior member of said firm, he conducted the defense of said defendant, Edward S. Dreyer, in the above-entitled case; that on February 19th, 1900, said trial was begun, and on February 20th, 1900, four jurors were accepted by the People and the defendant to try the issues in said case, and were thereupon sworn; that said jurors were sworn immediately preceding the noon adjournment of said court, at about 12.30 p. m.; that about the same time S. A. Goss and Alfred Goranson, the then acting bailiffs and officers of the branch of the criminal court in which said case was being tried, stepped up to the clerk, and thereupon the clerk arose and administered an oath; that during the trial of said case and at said noon adjournment this affiant had the use of the locker in said clerk's desk, the key thereof having theretofore been given him by said Goss, and during each adjournment this affiant kept certain books and papers in said locker; that at the time of the swearing of said bailiffs the oath was administered immediately next to said

locker and within two or three feet thereof; that at the time of the administering of said oath this affiant was at the locker, putting away some of his papers and books; that theretofore for many weeks this affiant had closely studied and knew the section of the Criminal Code, No. 435, which provides for the swearing of officers to attend the jurors when they retired to consider their verdict.

This affiant now upon his oath positively states that said oath so prescribed by statute was not administered by said clerk to said bailiffs; that this affiant cannot accurately set forth the words of the oath administered, but this affiant knows, and so states, that said oath was very much shorter than the oath prescribed by statute; that said oath so administered did not contain the pro-
54 vision that said officers should keep the said jury until they should have agreed upon their verdict nor suffer others to speak to them, and when they shall have agreed upon their verdict *he* shall return them into court.

Affiant further says that he was present during the entire trial, and that said bailiffs were not sworn at any other time during said trial other than upon said February 20th, 1900, and were not sworn at or about the time the jury retired to consider their verdict.

And further affiant saith not.

(Signed) ALFRED S. AUSTRIAN.

Subscribed and sworn to before me this 10th day of March, A. D. 1900.

WILLIAM L. TIBBS,
[SEAL.] *Notary Public.*

G. No., 54041. Criminal court of Cook county. People of the State of Illinois *vs.* Edward S. Dreyer. Affidavit of Alfred S. Austrian. Filed March 10, 1900. Patrick J. Cahill, clerk. Moran, Mayer & Meyer, attorneys and counselors, Unity building, Chicago.

55 STATE OF ILLINOIS, } ss.:
Cook County, }

PEOPLE
vs.
THE STATE OF ILLINOIS. } P. G. D., 54041.

Alfred S. Austrian, being first duly sworn, upon oath deposeth and says that he is the same Alfred S. Austrian who made an affidavit upon the motion *of* a new trial filed herein on March 10, A. D. 1900.

Affiant further says that he has read the affidavit filed herein made by Sanford A. Goss.

That said Goss stated to this affiant, after said jury had been discharged, that he did not know when said jury agreed upon their verdict, and that he had no information upon that subject whatever.

(Signed) ALFRED S. AUSTRIAN.

Subscribed and sworn to before me this 10th day of March, A. D. 1900.

PATRICK J. CAHILL, *Clerk.*

633. Edward S. Dreyer. Affidavit of Alfred Austrian. Filed March 10, 1900. Patrick J. Cahill, clerk.

56 That said affidavits so filed on behalf of the People are in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss.:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE
vs.
EDWARD S. DREYER. } Term No., 633; Gen. No., 54041.

Albert C. Barnes, being first duly sworn, deposes and says that he is assistant State's attorney of Cook county, and in such capacity assisted the State's attorney of Cook county in the trial of the above-entitled cause at the February term of said court; that upon the rendition of the verdict herein one of the counsel for defendant made a motion for a new trial, and as one of the grounds thereof stated that the jury had not been in charge of sworn officers; that thereupon, on the same day of the following day, deponent went to the office of the clerk of the criminal court of Cook county to look at the record of proceedings of said cause and asked the deputy clerk, McFall, who was minute clerk of the said court at the trial of said cause, to show deponent the records of said cause, and that said McFall thereupon began to discuss with deponent the proceedings of said cause and to state what he had done therein, and, among other things, said, in substance, as follows, the exact words deponent not being able to recall: "Why, Barnes, it is all nonsense about the bailiffs
57 not being sworn. Why, I swore them both and administered the oath," and thereupon said McFall repeated the form of oath administered by him, which was in substance as is required by section 435 of the Criminal Code of this State and in words as the same are used in said section, as nearly as deponent can recall; that deponent said to McFall, "I am not so much concerned as to what you said as to what the record shows," and told said McFall that deponent desired to see the record. Deponent recalls that one or two deputy clerks of the criminal court were then present, but is unable to say definitely who they were, but distinctly recalls the voluntary assertion on the part of said clerk that he administered said oath in form as prescribed by statute.

And further deponent saith not.

(Signed) ALBERT C. BARNES.

Subscribed and sworn to before me this 10th day of March, A. D. 1900.

PATRICK J. CAHILL, *Clerk.*

633, 54041. Edward S. Dreyer. Affidavit of A. C. Barnes. Filed March 10, 1900. Patrick J. Cahill, cl'k.

58 STATE OF ILLINOIS, } ss.:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE
vs.
EDWARD S. DREYER. } Gen. No., 54041; Term No., 633.

Sanford A. Goss, being first duly sworn, deposes and says that he is one of the bailiffs of the criminal court of Cook county and acted in such capacity in the court-room in which the above cause was tried at the February term, A. D. 1900, of said court; that with him, acting also as bailiff of said court, was one Alfred Goranson; that deponent and said Goranson acted as bailiffs in said court-room during the entire time of said trial and as such bailiffs had charge of the jury that tried said cause; that said jury was kept in the custody of the said bailiffs during the entire time of the trial of said cause, from their acceptance until their discharge; that prior to taking charge of said jury deponent and said Goranson were together sworn by the clerk, Henry McFall, the acting clerk of said court, to attend said jury to some private and convenient place and to the best of their ability to keep them together without meat or drink, water excepted, unless by leave of the court, until they should have agreed upon their verdict, and not to suffer others to speak to them, and that when they should have agreed upon their verdict to return them into court. Deponent is not able to state the exact words in which said oath was administered, but deponent, from long experience as a bailiff and having been frequently entrusted with the charge of juries in felony cases and having frequently had
59 the oath prescribed by statute administered to him, has such familiarity with the substance of said oath as to distinctly recall that the oath in substance, as above stated, was administered to him upon that occasion.

Deponent further states that after said oath was administered he and said Goranson did attend upon said jury, and when they were not in court sitting in the jury-box in the trial of said cause they were taken by him and said Goranson either to the jury-room, where they were locked up alone, or were taken directly to the hotel or from said room to a hotel designated by the court as the place for the keeping of said jury during the recess and adjournments of said court; that while said bailiffs were thus attending upon said jurors they were kept separate and apart from all other persons except when permitted by the court, with the consent of counsel, to converse with members of their families, and that they, the said bailiffs, received orders from the court with respect to giving them food and drink, which were explicitly obeyed.

Deponent further states that after said jury had retired to consider of their verdict they were not permitted to leave the jury-

room in which they were placed and locked for that purpose until they had informed said bailiffs that they had agreed upon their verdict, and that after they had agreed said bailiffs, under the instructions of the court, furnished them with meals and kept them together until the reconvening of court, when they rendered their verdict in court, and that while the said jurors were thus considering of their verdict no person was suffered to see or speak to them and they were kept together during such time without food, meat, or drink.

And deponent further says that his recollection in regard to the oath and all said proceedings *are* distinct and clear, because
60 he and said Goranson together were given special and explicit directions and instructions by the court prior to attending upon said jury under oath as to their duties in respect thereto.

Deponent further states that he and said Goranson had said oath in form and substance as aforesaid administered to them twice, once before taking any of said jurors into their custody and after the entire jury had been sworn and accepted and before placed in said bailiffs' charge.

And further deponent saith not.

(Signed) SANFORD A. GOSS.

Subscribed and sworn to before me this 10th day of March, A. D. 1900.

(Signed) PATRICK J. CAHILL, *Clerk.*

61 STATE OF ILLINOIS, } ss.:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE
vs. } Term No., 633; Gen. No., 54041.
EDWARD S. DREYER.

Alfred Goranson, being first duly sworn, deposes and says that he has read the foregoing affidavit by Sanford A. Goss, and that he is the Alfred Goranson therein referred to, and is and was, at the time of the trial of the above-entitled cause, a bailiff of the criminal court of Cook county, and as such in attendance upon the jury in the above-entitled cause; that he knows the contents of the above affidavit and knows that the same are true.

And further deponent saith not.

(Signed) ALFRED GORANSON.

Subscribed and sworn to before me this 10th day of March, A. D. 1900.

(Signed) PATRICK J. CAHILL, *Clerk.*

That said testimony of said Henry C. McFall, taken upon said motion, is as follows:

62 HENRY C. McFALL, called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Mr. McFall, you are the minute clerk of this court?
A. Yes, sir.
Q. Criminal court of Cook county. You were the minute clerk during the trial of the case of the People against Edward S. Dreyer, recently tried in this court?
A. Yes, sir.
Q. Did you administer any oaths to the bailiffs attending the jury after the oath which you administered to them on the 20th day of February, 1900?
A. I administered one oath to them after the first four jurors was accepted and sworn.
Q. Well, did you administer any other oath to them?
A. I have no recollection of administering any other oath.
Q. After that time?
A. After that time.

Cross-examination by Mr. BARNES:

Q. Do you remember of having been asked by the judge in his chambers, after the motion for a new trial was made and it was asserted that the jury was not placed in charge of sworn officers, if you had sworn them, and your saying you swore them twice, and that you also made such statement in the presence of Bailiff Goss at the same time?
A. I do not remember making any such assertion.
Judge MORAN: A little louder, Mr. McFall.
63 A. I say I do not remember making any such assertion.

Mr. BARNES:

(Q.) Do you remember of the court asking you with regard to swearing the bailiffs in charge of the jury?
A. No; I do not.
Q. What is it?
A. I remember speaking to the court myself. I spoke to the court and told him that I had sworn the bailiffs taking charge of this jury immediately after the first four were accepted and sworn.
Q. And do you remember also telling the court at the same time that you swore them twice?
A. No, sir; I do not.
Q. Do you remember that Bailiff Goss was present at the time you had the talk with the court?
A. He was in the chambers there; yes.
Q. Was anybody else present?
A. I think not. I don't remember.

Which affidavits and the testimony of said McFall were all the affidavits or testimony heard, offered, or considered by said court, either in support of said motion for a new trial or against the same.

And thereafter, on March 15th, A. D. 1900, said court overruled said motion for a new trial, as hereinafter shown more particularly, and the defendant then and there excepted to said court's overruling said motion as aforesaid.

The court further certifies that on the 21st day of February, A. D. 1900, the counsel for the People made the opening statement to the jury and the hereinafter proceedings and evidence were had, taken, and offered in said case:

64 WEDNESDAY, *February* 21*st*, 1900—10 a. m.

Counsel for the People made the opening statement to the jury, as follows:

Mr. BARNES: May it please the court and gentlemen of the jury, you have probably, all of you, in the course of this examination learned what the case is about, and the only object in making introductory remarks before introducing evidence in the case is to inform the jury what the case is about and what evidence may be introduced, so that the jury will understand when the evidence is being introduced what the relevancy of it is and what the application of it is. You have learned in a general way here that the defendant in this case is charged with withholding funds from the West park board, and that he was once the treasurer of the West park board; funds came into his hands, and that he failed to deliver them over to the West park board after he had ceased to be treasurer and after proper demand therefor.

Now, if a party was charged with robbery or larceny or rape or murder—any of the ordinary crimes with which you are perfectly familiar—it would hardly be necessary to make any remarks at all, because men in a general way understand what all of those things mean; but sometimes there are crimes with which
65 a juror not perfectly familiar—somethings have been created and made crimes which were not crimes in the early history of jurisprudence, in the early history of the race, and it becomes necessary for the protection of society and to prevent the wrongs that would result to society to punish certain acts of public officers, and therefore the crime with which the defendant is charged in this case is distinguished in a way from those other crimes because it is a purely statutory crime. It is a law laid down by the statutes of this State, manifestly for the purpose of protecting the public in such cases, that the party who fails to return property where he is a public officer, to turn over property that comes into his hands to his successor in office especially appointed for it, is crim-ally liable, provided he does not make the defense laid down in the statute.

Now, I want to read the statute, in the first place, under which this indictment is brought—section 215 of our Criminal Code. It is a broad statute, so as to take in various classes of officers, and it is designed to take in all of these various officers, State, county, or what they call municipality—officers of a certain kind that have moneys come into their hands. This is the way it reads:

"If any State, county, town, municipal or any officer or person

who now is or hereafter may be authorized by law to collect,
66 receive, safely keep or disburse any money, revenue, bonds,
coupons, bank bills, notes, warrants or dues, or other funds or securities belonging to the State or any county, township, incorporated city, town or village, or any State institutions, or any canal, turnpike, railroad, school or college fund or the fund of any public improvement that now is or may hereafter be authorized by law to be made, or any other fund now in being or that may hereafter be established by law for public purposes, or belonging to any insurance or other company or person, required or authorized by law to be placed in the keeping of any such officer or person shall fail or refuse to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over, or his agent or attorney, authorized in writing, he shall be imprisoned in the penitentiary not less than one nor more than ten years; provided such demand need not be made when, from the absence or fault of the offender the same cannot conveniently be made."

That provision will not come in this case, because we shall prove to you a demand.

"And provided that no person shall be committed to the penitentiary under this section, unless the money not paid over shall
amount to $100, or if it appear that such failure or refusal is
67 occasioned by unavoidable loss or accident."

We shall show more than $100 in this case, and of course it will be a penitentiary offense.

" Every person convicted under the provisions of this section shall forever thereafter be ineligible and disqualified from holding any office of honor or profit in this State."

Now, in a general way, to read that portion of the statute, leaving out the phraseology that governs all cases, and to bring it down to this case, the law would read about like this:

If any county, town or municipal or other officer who has authority to collect, receive, safely keep or disburse any money belonging to said city and town or State or the fund of any public improvement or any other fund that may hereafter be established by law for public purposes, required or authorized by law to be placed in the keeping of such officer shall fail or refuse to pay over or deliver over the same when required by law or when demanded of him or when the demand is made by its successor in office or trust, he shall be imprisoned in the penitentiary, provided that he shall not be committed to the penitentiary if it appear that such failure or refusal is occasioned by unavoidable loss or accident.

I don't think there will be any contention about any ac-
68 cident in this case. Now, the State proposes to prove to you that Mr. Dreyer, the defendant in this case, comes clearly within the provision of this act. It proposes to prove to you this state of facts: We shall show that Mr. Dreyer became the treasurer of the West Chicago park board about 1894, I think—1893 or 1894; that he remained the treasurer of that park board up to December 21st, 1896; that during that time a large amount of money came

into his hands as the treasurer, and that when he ceased to be treasurer on December 21st, 1896, there was $316,000 in his hands that had not been accounted for by him; that amount stood charged up to him on his own books; that on that day Mr. Blount, F. M. Blount, became the treasurer of the West park board; that afterwards he demanded of Mr. Dreyer that he would turn over to him this money; he served the notice upon him, made the request of him; that he hasn't received the money since that time and Mr. Dreyer has never turned over any money or any funds or in any way accounted for this $316,000 since that time.

Now, in showing how he received this money and how he had that amount of money upon hand we shall have to show to you the way business was done, how it came into his hands, and it will be done mainly for the purpose of identifying the account in his bank which was kept in the name of the West park board, as the
69 account of the treasurer of the West park board.

The State, as you have learned here, has to prove its case. It has to show to you that he was treasurer. There may be a great many little details, for instance, in this case that you as inexperienced men in this kind of business might wonder why we have to prove, and yet if you were acquainted with all the technicalities of the law—as you have been informed here, the defendant is presumed to be innocent until he is proven to be guilty, and we must establish his guilt beyond a reasonable doubt; you readily see, if you are acquainted with those technicalities, that it becomes necessary for the State, in this case as in every case, to make out its case—has to show to the jury from the beginning as if a man were brought right in this moment and charged right before his peers here that he has committed an offense. He says, "I haven't." We have to show to the jury he has, and for that reason don't become tired, don't become disgusted in the course of this trial, if we have to show little details and to show them very carefully, because we are held accountable for it by the law, and we will be held strictly to account to make out our case here by the defendant.

Now, in making the proof I want to tell you what this proof will consist of, so that you will be able to follow the evidence
70 closely and see the application of it. In the first place, we will show to you that Mr. Dreyer was treasurer of this park board, and then we will introduce here—we will show him to be the treasurer by showing the minutes of the West park board; that he was elected treasurer. The West park board is a corporation. It kept minutes, and we shall introduce those minutes, in the first place, for the purpose of showing who the officers were at that time; that Mr. Dreyer was the treasurer; that he was elected then several years when this money was coming into his hands. We will show to you that he was acting as treasurer during that time, and that is sufficient if we do not prove his election. We will show to you that he was legally elected treasurer. We will show that he qualified and filed his bond, and that when he qualified he received money. We will further show that the rules of the West park board required that the funds which came into the hands of the treasurer should be

kept in a bank in the name of the West park board, and we will show to you that Mr. Dreyer, when he became treasurer, deposited these funds in his own bank. He was then a banker, doing a banking business under the name of E. S. Dreyer & Company. His partner was Mr. Berger. They had a bank on the corner of Dearborn and Madison streets. When these funds were paid Mr. Dreyer they were put in the bank there in this way: West park commissioners. In other words, he obeyed the rules of the board and kept the account in
71 a bank, as he was required to do, in the name of the board; but, gentlemen of the jury, the account was the treasurer's account. It became the treasurer's account, as we shall show you, because he drew out the money. Nobody else did. While the West park board's moneys were deposited in this account in the name of the West park board, no one ever drew those moneys out excepting Mr. Dreyer or under his direction, so that he had absolute control of this fund.

Now, in showing that to you we will have to show you this unless these facts are conceded—we will not attempt to show every dollar that has gone into that bank and just what it is composed of, because that would involve a great deal of evidence and a great deal of time, because there were millions of dollars received in that account for 1894 up to the time Mr. Dreyer ceased to be treasurer. It is only necessary for us to show to you, gentlemen, enough funds going into that account to show you what kind of an account it was and whose money it was and who controlled it. To that end we will show to you this: The West park board's funds were made up largely of taxes and those taxes had to be taken out from the public officers that collected the taxes. They had to be gotten out of the county treasury. The taxes are collected and put into the county treasury, and whenever the West park board wanted its share of the taxes to which it was entitled it drew an order on the county treasurer—
72 for instance, county treasurer pay to Mr. E. S. Dreyer, our treasurer, so much money, our share of the taxes. It was a warrant drawn on the county treasurer. This warrant was directed to the county treasurer to pay the board's treasurer. Now, we will show you that those warrants were collected by Mr. Dreyer. Those warrants would be carried to the county treasurer's office, and the county treasurer would pay Mr. Dreyer by taking up the warrant and giving Mr. Dreyer a check for, say, 40 or $50,000, and that check would read, "Pay E. S. Dreyer, treasurer;" so that the check being in that form and received by him, no one in the world could collect that check excepting by Mr. Dreyer's endorsement or by the endorsement authorized by Mr. Dreyer to be placed there. We will introduce some of those checks, and we will show to you that Mr. Dreyer sent somebody to the county treasurer's office with those warrants; of course he didn't go himself; that these checks were given to take up these warrants, and we will show you the warrants and checks, and that those checks went back into Mr. Dreyer's account; were deposited in his bank or were deposited in the National Bank of Illinois, where he kept a deposit, but always went to his account, his

bank, and so charged up to him in this account of the West Chicago park commissioners.

Now, to make it perfectly clear, when Mr. Dreyer or his clerk would go to the county treasurer to get any sum of these
73 taxes with a draft on the county treasurer, we will say for $50,000, the county treasurer would give him a check for that $50,000, and then he would take that check over to Mr. Dreyer's bank and it would be entered up as so much money to the credit of the West Chicago park commissioners. Now, in that way that shows that the West park funds went into the account. We will show to you that he rendered statements of that account. We will show to you the statement rendered, the last one, November 30th, 1896. You see that was the last full month that he served as treasurer. We will show to you that he sent in an account and that it corresponds exactly with the account of the West Chicago park commission. We will show to you that the West park board itself never drew a dollar out of that account; that whenever it wanted to pay any bills of the West park board it would say, "Mr. Dreyer, pay so and so, so much money." In other words, it drew on its treasurer for the money, and Mr. Dreyer would pay out this money. Now, we are not complaining at all about anything that Mr. Dreyer paid out for the West park board, but what we are complaining about is that he did not pay out for the West park board, and what he did not pay over. That amount is $316,000. We will take the books of his own bank and show that this West Chicago park commissioners' account shows just exactly the amount we claim. There will be no dispute about it.

74 Now, gentlemen of the jury, after we have shown that, and after we have shown that he ceased to be treasurer, which we will do, and that Mr. Blount was elected to be his successor and that Mr. Blount made a demand upon him and received no money, we shall show all that there is to show, all that the State is expected or required to show, to establish the guilt of the defendant, and we will show that which makes his guilt under the statute. We are not expected or required to go into his defense and find out whether he has got any defense. The statute here establishes a defense that can be made in this case, an accident. Where, for instance, there is no questioning or denying the statement, for instance, that the money was received and failed to be delivered over, yet there is a defense—the property may have been burned up. It is competent to show that a man couldn't turn it over because it was burnt up—there was an accident. The failure may have been occasioned by an unavoidable loss, and I apprehend, gentlemen of the jury, that whatever defense is made in this case will be made, if at all—purports to be made upon that basis; but we shall show to you, gentlemen—we will go to this extent, to show that this loss, if these funds are absolutely lost, were not lost by anybody else than Mr. Dreyer and his firm. We shall show to you that at the time his bank closed, which was on December 19th, Saturday, that he only
75 had in that bank, to the credit of that bank, about 5 or $6,000 cash—$5,850.

It will appear here in this case—another feature of the case, and you have heard it talked about—the National Bank of Illinois. Every juryman has been questioned and he has been asked if he hasn't heard of the National Bank of Illinois, of its failure and collapse; that it occurred about the time Dreyer's did. I don't think that there will be any question at all about that matter, any difference of opinion as to the fact that those two banks stopped business the same day—that is, that they never opened up business after December 19th, which was on Saturday. Sunday was the 20th and Monday the 21st. Neither of those banks opened, and it will appear here in all these checks that we will introduce in evidence that there was on the back of them the stamp of the National Bank of Illinois. The National Bank of Illinois collected these checks through the clearing-house. Now, I suppose you all understand something about that; that there is a clearing-house in the city of Chicago through which the banks collect their checks, and Mr. Dreyer's bank did not belong to that clearing-house, so all his checks were collected through the National Bank of Illinois, and whenever a check was brought into his bank it was sent over to the National Bank of Illinois to be collected for him. They collected these checks for him through an arrangement, and so in that way he got
76 the use of the clearing-house through that bank. Furthermore, Dreyer did not keep all the moneys that came into his bank, but took them over to the National Bank of Illinois to be deposited there, and he kept an account there in the name of his firm, Dreyer & Company.

Now, if it be claimed here that Mr. Dreyer has not returned the $316,000 in money which we will show he collected, that it was because the National Bank of Illinois failed, we will show to you, and we will show to you in the beginning of the case, that he only had to his credit in the National Bank of Illinois on the 21st of December, 1896, the day it failed to open and the day he failed to open his bank, $552.21. Now, when we show to you in this case that he has received all this money, when we will show to you that it all went into the account of the West Chicago park board in the bank, when we show to you that his own bank book showed that he received it, when we show to you that those bank books show that there was $316,000, and never paid out, stands there on his books as having been received, and when we shall show to you further that on that very day, December 19th, he did not have to his credit in his own bank $6,000, and did not have in the National Bank of Illinois—did not have $600, in other words, in both banks—he did not have cash in the banks together more than $6,000, and he owed this $316,000 to the West park board, then the question
77 will arise, where did he lose it and how did he lose it? And we shall contend to you that it wasn't lost and could not have been lost by the National Bank of Illinois when he had his account there of $500.

Judge MORAN: Counsel is proceeding a long way beyond an opening statement, your honor—attempting to argue upon the facts.

Mr. BARNES: The court is not present.

Judge MORAN: Go on and keep within an opening statement.

Mr. BARNES: I am keeping within it.

These things, I say, we will show to you, and furthermore, if it becomes necessary, we shall show in what we call rebuttal—that is, we have a right to attack the defense—put in the evidence against the defense after they have put in their case—if it becomes necessary in this case to meet any contention of that character—that the National Bank of Illinois was the cause of Mr. Dreyer's failure. We shall show to you, further, that Mr. Dreyer at the time of the failure of his bank and at the time of the failure of the Illinois bank not only had only in that bank a little over $500, but that he owed that bank over $500,000, and therefore we shall contend in this case that the failure of the National Bank of Illinois does not have the slightest bearing upon Mr. Dreyer's failure——

Judge MORAN: I object.

78 Mr. BARNES: Because of this state of facts.

Judge MORAN: I object.

The COURT: What is the objection?

Judge MORAN: It is not a statement of what counsel intends to prove. He is arguing in this case and not stating what he intends to prove. An opening statement should be what he intends to prove in the case and not what he intends to argue.

Mr. BARNES: I am stating the contention of the State, what it claims, without going into all the details.

The COURT: It is not proper to argue the case, but anything that is proper to prove may be shown, and the prosecution in opening may take up and discuss what it understands is to be urged by the defense.

Mr. BARNES: Now, gentlemen of the jury, that in effect covers this entire case, and the details in making the proof will be followed by you as the witnesses go on the witness stand.

And thereupon Judge Moran on behalf of the defendant made the following opening statement:

79 Judge MORAN: If your honor please, and gentlemen of the jury, it becomes proper for you to know the defendant's position with reference to this case. You see the statute read to you by the State provides that if any such officer—and that includes such an officer as Mr. Dreyer was—if any such officer withholds, fails, or refuses to pay or deliver over the same—that is, the money that he has received—required by law or demand is made by his successor in office or trust, then he shall be imprisoned in the penitentiary not less than one nor more than ten years, provided such demands need not be made when he is absent, and so on, and provided that no person shall be committed to the penitentiary under this section unless the money not paid over shall amount to $100 or it appears that such failure or refusal is occasioned by unavoidable loss or accident.

Now, the thing your attention will be directed to is whether the loss of whatever money they will be able to show came to Mr. Dreyer's hands—if his failure to pay it over was occasioned by un-

avoidable loss or accident—that is, if the accident prevented his paying it over was an unavoidable one in the ordinary acceptation of that term or the loss, if there was any loss, was an unavoidable loss.

Now, it will appear to you from the evidence in this case that Dreyer & Company had a bank, and that that bank had been
80 organized in a small way for some 17 years; that during that time it never kept the money in its own bank—that is, the money that came into that bank was deposited in the National Bank of Illinois. In Dreyer's bank was kept on hand but a very small amount of money. It was a small bank. It wasn't a member of the clearing-house. Checks upon it could only be paid through the National Bank of Illinois, and the money of Dreyer & Company—whatever money there was of Dreyer & Company—was deposited—taken over and put in the National Bank of Illinois. That was the course of business for seventeen years.

At a certain time, while Mr. Dreyer was absent from the city, certain officers of the National Bank of Illinois, being connected with the West park board themselves, one of them president of the West park board, had Mr. Dreyer elected treasurer of the West park board, and the president of the National Bank of Illinois went upon Mr. Dreyer's bond. That will appear in this case. Mr. Snyder, the president of the National Bank of Illinois, went on Mr. Dreyer's bond, and upon Mr. Dreyer receiving the money as treasurer of the West park board that he did receive these people required him to deposit it in the National Bank of Illinois, and it will appear in this case that the very first moneys he ever received as treasurer he deposited in the National Bank of Illinois, and that the account was kept there for a consider-
able time in the name of Dreyer, treasurer, in the National
81 Bank of Illinois. It will appear further that subsequently on direction of those officers of the National Bank of Illinois the book-keeping form of the deposit was changed and it was still kept in the National Bank of Illinois, every cent of money kept there, but kept in the book-keeping form in the name of Dreyer & Company, and you will find that the West park commissioners themselves deposited the funds with Dreyer & Company in form; that Mr. Barnes has told you. I agree with him in that, that instead of giving the money in form to Dreyer individually it was deposited with Dreyer & Company. You will find when the books are brought in here it will be the West park board in account with Dreyer & Company. Whatever contest there has been about that heretofore the State has given up, and they say now that is the way it was done.

Now, we will show you that the National Bank of Illinois was, up to the Saturday that it failed—that it closed—one of the largest and strongest banks in the city of Chicago; that nobody ever had any doubt or thought of that bank being in danger; that it was supposed to be one of the solid financial institutions of Chicago, and in that bank was where Dreyer put his money. We will show you and it will appear that of the millions of dollars

that Dreyer, as treasurer, received and deposited in the National Bank of Illinois, and of the millions of dollars that were drawn
82 out down to the very day the National Bank of Illinois closed, every check was paid that was presented on that bank; every single check was paid, and we will show you that the officers of the National Bank of Illinois agreed with Dreyer that they would pay every check presented by the West park board for money, every check presented. In other words, it will appear that the account in the National Bank of Illinois was recognized as the money of the West park board, and that they were at all times bound to honor the calls of the West park board when endorsed by Dreyer for the full amount of the account in the bank, for the full amount of the park money that the bank had received. What may appear as to what was the book-keeping credit of Dreyer & Company as between them and the National Bank of Illinois may or may not be as counsel for the State has said. I don't now know whether that is 5 or $6,000, and it is wholly immaterial. I don't care what it is. The National Bank of Illinois received—coming down to this sum that they claim—all the funds of the West park board during the time that Dreyer was treasurer and paid out all the funds of the West park board upon Dreyer endorsing the check. Not a check was thrown out. Every check was paid. Every cent that was called for was paid until the fatal Saturday, when, like a flash of lightning out of a clear sky, the National Bank of Illinois
83 was closed up by United States authorities. At that time $316,000 of the West park funds was in the National Bank of Illinois; put there by Dreyer and recognized as there by the National Bank of Illinois.

Now, we will show to you that when the United States receiver is appointed for a national bank by the Comptroller of the Currency of the United States that the key in that bank is turned instantly, and that nobody can get a single dollar out of that bank until it is gotten out of it under a proceeding at law. We will show to you that the moment that the Comptroller of the Currency, at Washington, finds that the bank has done something and he can make some examinations of those banks, and he does all the time—for all we know, today the Comptroller of the Currency may be examining some banks in Chicago to see whether they have loaned money on some securities, more than they ought to—nothing said about it. The financial world is not alarmed about it, but the eye is kept open. We will show to you that Mr. Eckels, who was the Comptroller of the Currency at that time, made an examination of the National Bank of Illinois, and he found that the national bank had made a larger loan on some securities than in his judgment they ought to make, and that because they made that loan on those securities he appointed a receiver and closed the bank, and that at the time he closed that bank, on that Saturday—and it did not open on Monday morning—there was $3,500,000 in actual money; I do not
84 mean in promissory notes or mortgages or bonds, but I mean in greenbacks and national bank notes and silver and gold

coin—$3,000,000 right in sight, that you or I, if they had permitted us to put our hands on it, could have done it.

Now, with that condition of things the National Bank of Illinois closed. Dreyer could not get any money out of there. The West park board couldn't get any money out of there. Nobody who had money in there could get one single cent out of there. It didn't make any difference whether the money deposited in the bank—if I deposited money in that bank—if you gave me your money and I deposited it in that bank for safe keeping, I couldn't get it out to pay to you, and you couldn't get it out. Nobody could get it out. It can only be got out by legal proceedings by which the bank is bound up, and the money is paid out in certain percentages as its proceedings goes along to the men to whom the money is due. We will show you that the West park board of Chicago recognized that condition of things. The Illinois national bank or the agents of the Illinois national bank when it failed undertook to set up the claim that they had against Dreyer & Company against the money that had been put in by the West park board. They undertook to say, Yes, this money has been put in by the West park board; that is all right. The money that Dreyer put in as treasurer we will take now to pay Dreyer's debt to us. We won't pay that out now, after the failure. The men that were in con-
85 trol of the bank took that position. My general recollection is, that right up to that Friday or Saturday a check had been presented, a warrant—if not on that very day, a very few days before that—and on this matter of dates or how soon it was done I don't want to attempt to mislead you, and I therefore state that I do not exactly recollect. Warrants of the West park board were presented and paid. Nobody thought of denying it until the crash came. Then these officers—the receiver of the bank said: "I find the money in here; I find the claim here against Dreyer & Company. While this was the West park board's money, it was deposited in the account of Dreyer & Company; therefore Dreyer & Company are indebted to me, and I will hold the West park board accountable for the debt." The West park board recognized that condition afterwards. We will show you that they filed a bill against the National Bank of Illinois and the receiver of it in the United States district court for this district, claiming that they could not set up and hold the park money for the debts of E. S. Dreyer & Company, claiming that the bank received that park money, under the direction of its officers, from Dreyer; that they knew it was park money; there never was any doubt in anybody's mind; and, after receiving it in that way and holding it in that way and paying out the money under Dreyer's check, now when the failure came they couldn't turn around
86 and say, "We will pay Dreyer's debts with the West park money."

That is the position the West park board took in that case. The bank and the receiver of the bank defended on the theory that they should offset their claim againt Dreyer & Company against the money of the West park board, but Judge Grosscup—we will show you his decree; introduce it in evidence before you—after hearing

the case, held that the money of the West park board in the National Bank of Illinois belonged to the West park board, and he entered a decree against them, a judgment against them, for the exact $316,000 that they claim that Dreyer did not turn over. Now, the decree against the National Bank of Illinois entered in the United States court, upon hearing, to pay over to the West park board this very $316,000 that the National Bank of Illinois would not pay or hand over after it failed, closed its doors, that — the $316,000 Dreyer has never been able to get since. Furthermore, we will show you that Dreyer's bank went into the hands of a receiver, and that the receiver claimed to get $316,000 to apply on the money of the West park board.

Now, gentlemen, if we show you these facts, we contend that they will establish this proposition, that this money so far, in the first place, is not actually lost at all. It is in a bank that is in liquidation under the superior power of the Government of the
87 United States, that came and seized it when this money was in it and stopped the payment of all funds except as they were ordered to be paid out by judgments of the courts or ordered to be paid out by the Comptroller of the Currency of the United States. You couldn't draw a check on that bank after that failure; of course, it wouldn't be honored; you couldn't get any money out of it; nobody could touch it. It was there, but immediately upon a failure of that kind there becomes a contest about how the money shall be distributed. It is to go in the end to the persons to whom it belongs.

We shall prove to you that Mr. Dreyer never had applied to his own use one single red penny of that money—not one single cent. Numerous checks will be introduced before you, gentlemen, but it will appear from all these checks that E. S. Dreyer never drew a check in his own favor for one single red cent, and not one cent of this money ever went to the benefit of E. S. Dreyer. It will further appear that during the time that E. S. Dreyer was treasurer he paid to the West park board an aggregate, as treasurer, received and paid out in the way that I have described to you, through the National Bank of Illinois, a sum exceeding $2,000,000, and that of interest he paid to the West park board some 12,000 to $15,000. We will show the exact amount, every cent of this going to the West park board.

Nothing wrong about this case. Nobody took the money
88 and put it in his pocket and went away with it. We will show you that this large amount of money couldn't be kept in Dreyer's little bank; no place to keep it there; no safe place; that he selected one of the strongest banks in the city of Chicago, so far as the public knew and so far as he knew, to put that money in.

Some of you gentlemen have replied, I think, that you had dealings with the Illinois Trust & Savings bank. It is just as if he had selected that bank to put that money in and keep it in—strong vaults, great reputation, immense amount of money—upwards of $3,000,000 in actual cash—in their vaults when they were turned down by the superior power of the United States Government, acting through the Comptroller of the Currency.

We will show you that from beginning to end, in this whole transaction, Mr. Dreyer has been, as we will show he has been throughout his entire life, a man of most perfect honesty, simplicity, and straightforwardness; that not a penny went to his use or his benefit, and that when that bank closed that this money of the West park board in it, which they have a judgment for now and which they will collect, every cent of it——

Mr. AUSTRIAN: Money set aside.

Judge MORAN: I believe. I am not so fresh with these facts as my learned friend. We will learn the exact facts from the evidence. I am only outlining them to you now.

89 We will show you that this little man, Dreyer, had not one single dollar in the world in his possession, nor property; nothing covered up or hidden, not one cent—as bare of property as he was the moment he was born into the world.

Now, we will show you in that way, gentlemen, that when the demand was made upon him, and you will see the circumstances of the demand, the parties that made the demand upon him knew all these circumstances that I speak about, and knew that the money of the West park board was in the National Bank of Illinois. They knew that the West park board had an actual judgment and decree against that bank for this very identical $316,000. They knew that that man, Dreyer, could no more get at that money and pay it over to them than I could give you the moon this minute if you were to demand it from me. They knew they demanded a thing which it was utterly impossible for any human being on God's earth to give. Now, they asked, under those circumstances, under those conditions, that that money in that big institution, thus wrapped up with the overwhelming power of the Government, which nobody can challenge except the courts of justice, and where a court of justice had already decreed the National Bank of Illinois and its receiver to pay over this $316,000, with interest, to the West park board—they ask you, because Dreyer did not under that condition of things

90 pay over to his successor $316,000, that was thus out of his hands, to send him to the penitentiary.

Those are the facts, gentlemen, that we will prove in this case. I invite your attention to the evidence as it goes in. Counsel for the State has already shown that he knows those checks went to the National Bank of Illinois because he told you that there was a stamp upon them showing that they went there. He has already told you that he knows that money was in the National Bank of Illinois and nowhere else. He has told you that Dreyer only had in his bank on the Monday when it didn't open, because the whole thing closed on Saturday, some $500, which was the ordinary condition of Dreyer's bank. Dreyer's bank never had more than 400 or $500 in it at all—just a little money kept in it to pay some small checks and keep those things along—all the money of Dreyer's bank always deposited for 17 years in the National Bank of Illinois. You watch these things, gentlemen, as they come in—watch the whole proceedings. See if these facts that I am stating to you come out. If they do, we will claim the benefit of those facts.

There is another point in this case that we will introduce evidence upon. As you heard here, there was a trial of this case last summer in this court, not before the judge who presides here now, but before another judge. One of the defenses we have in this case
91 besides this long proceeding through these checks and all—that is, that we were once in jeopardy in this case before, and now I will state to you that defense. It is a rule of the common law and a rule of the law and constitution of this State and of nearly every State in the Union that no person shall be put twice in jeopardy for the same offense. Now, it is a rule of the law, and I think the instructions will be given to you by his honor the judge, that a man is in jeopardy the moment he is put on trial before a jury charged to try his case. To illustrate: Dreyer is what is called in law now in jeopardy before you gentlemen—that is to say, you are charged at this moment with Dreyer's trial. The moment the jury is sworn and the trial commences—the moment the jury is sworn to well and truly try and true deliverance make between the prisoner at the bar and the People of the State of Illinois—that moment what is known as the jeopardy of the prisoner begins. That is being once in jeopardy, and to illustrate, now, if for any reason his honor should rise up in his place and say to you gentlemen of the jury, "You are discharged from this case," you would go out of court and scatter to your various avocations, and that would be the end of any trial of Mr. Dreyer hereafter. He could never be tried again, though you haven't heard a word of evidence yet. It is a princip*al* of law that he never could be tried again for this offense. Now, we will show you that in the trial last summer that occurred in this court, and perhaps I ought
92 to go a little further to have you understand the facts of what we claim the law is on this point. After the jury has heard the evidence in this case they are to be kept together until they are discharged from necessity. A jury sworn in a felony case is never to be discharged until he is discharged from necessity. That is a rule of law. Necessity may arise from one of the jurors being taken dangerously ill or fall in a fit, for instance—epileptic fit, losing his mind, maybe; from the death of the prisoner at the bar or the serious and dangerous illness of his honor the judge; from the serious and dangerous illness of a juror; but unless this necessity exists the jurors are to be kept together until another necessity arises. Sometimes this occurs that a juror is unable to agree on a verdict in the case. Now, upon their first disagreement they are not to be discharged. They are not to be discharged until they are kept for such a length of time that it is apparent that they must be discharged from necessity. The fact that jurors in a trial say they don't think they can agree—come into court and say they don't think they can agree—does not form a necessity. Now, if the jurors are discharged by the State before the time arrives that it is demonstrated there is a necessity for their discharge because they never can agree, that operates the same as it would if his honor the judge were to discharge you at this moment out of this case. A man
93 is once in jeopardy and he never can be tried again.

Now, we will prove to you in this case that in the trial last summer, after the jury had heard the evidence and the arguments in the case and retired to their jury-room, that upon the first ballot of those jurors——

Mr. BARNES: I object for the reason that counsel well knows that in no event could there be any evidence given of the deliberations of the jury in the jury-room in this case or any other. The point he raises is that they were discharged before the necessity appeared to the court, but the necessity—no evidence of necessity can possibly be given by showing what transpired in the jury-room. Therefore I contend that it is not right that counsel should speak of that. His point is perfectly clear, and couldn't be made on that evidence at all. Don't you think I am right on that, Judge Moran?

Judge MORAN: No, sir. I propose to offer proof of all these things that I am saying to this jury. Whether the court will rule against me I don't know. I expect the court will not, but that is a question counsel can object to when the evidence is offered, and not before. I have a right to state to the jury that I expect to prove just what I have. The court may rule against me on some of those other propositions; I don't know; I think not. It is time for counsel to object when the evidence is offered.

Mr. BARNES: I don't expect you, Judge Moran, to state to
94 the jury what you conscientiously know as a lawyer you cannot prove.

Judge MORAN: I won't state that to the jury. I think that the condition of the jury in such a case is one of the considerations that is to actuate the court.

The COURT: Yes; it is brought to the attention of the court, but the court acts only upon the knowledge it has.

Judge MORAN: That may be true, your honor. I propose to show to this jury, and to offer to show to it under your honor's ruling, the condition of the *vision* of the jury, to show that they change from time to time until they stood nine for acquittal and three for conviction under that evidence, and that within a few hours, comparatively, after they went out they were called into court, and, standing in that condition, were discharged by the court and against the objection of the defendant and against the objection of his counsel.

The COURT: I think you may make the statement now, but I don't think you can go in—that is my present impression—to the deliberation of the jury or the mental condition of the jury. If we can prove their deliberation we could call the jurors and show their minds were made up one way or the other. I don't think that can be done, but I do not think there is a special objection to your statement.

Judge MORAN: Well, we will argue that when we come to offer the testimony. We have a great many authorities on that
95 question.

The COURT: Oh, yes; and what the rule is.

Judge MORAN: Whatever the evidence is we claim, and, as his honor has said, we shall introduce the evidence, so far as we are per-

mitted to do it, to show that no necessity for the discharge of the jury existed, and that, there being no such necessity, the discharge of the jury was the practical acquittal of the defendant in this case.

Now, we put in this defense because we want the constitution of the State and the law of the State to be enforced here as everywhere. We want the doctrine that is as old as our jurisprudence, that no man shall be put twice in jeopardy for any offense applied. How we will reach that in the end I feel bound to state it to you now; how we will reach it in the end we will show as the evidence goes along. I state to you our defense upon the main action, and I state to you our defense that we have been once tried in this court in this matter, and that the jury that was charged with our liberty was discharged from the case without the necessity existing that the law requires shall exist in such a case. These will be the substantial matters of our defense. I cannot state all the things now because this is only an outline. You will find that there is an interest statute passed in this State requiring the money in the hands of such treasurer as Mr. Dreyer was to draw interest, and you will
96 find that when the money was put in the National Bank of Illinois by Dreyer, and while it was kept there at all times, he paid interest upon it to the West park board.

Adjourned until 2.00 p. m.

97 2 P. M.

Court met pursuant to adjournment; whereupon the hearing of the case was resumed as follows:

Thereupon the People offerred the following:

THOMAS P. KENNEDY, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. What is your name?
A. Thomas P. Kennedy.
Q. What is your business, Mr. Kennedy?
A. Assistant secretary West Chicago park commissioners.
Q. How long have you been secretary of that board—assistant secretary?
A. Very near 7 years.
Q. Since what year?
A. 1893.
Q. Where are the offices of the West park board?
A. In Union park.
Q. In the city of Chicago?
A. City of Chicago.
Q. What county and State?
A. County of Cook and State of Illinois.
Q. How long have their offices been there?
A. About 12 years.
Q. Who is the present acting secretary of the board?

A. At present?
Q. Yes, sir.
A. Ernest G. Schubert.
98 Q. How long has he been acting secretary of the board?
A. This is the third year he is serving.
Q. Do you know his signature?
A. Yes, sir.
Q. Look at these papers which I hand you and state whether or not the signature to these several certificates—whose signature it is. Look at this one first, which is marked "State's Exhibit A" (handing witness paper last referred to).
A. The signature of Ernest G. Schubert, secretary.
Q. And look at this, marked "State's Exhibit B" (handing witness paper so marked).
A. It is the signature of Ernest G. Schubert, secretary.
Q. And look at this one marked "State's Exhibit C" (handing witness paper so marked).
A. It is the signature of Ernest G. Schubert, secretary.
Q. And this one marked "State's Exhibit D" (handing witness paper so marked).
A. It is the signature of Ernest G. Schubert, secretary.
Q. And this, marked "State's Exhibit E" (handing witness paper so marked).
A. It is the signature of Ernest G. Schubert, secretary.
Q. And this, marked "State's Exhibit F" (handing witness paper so marked).
A. It is the signature of Ernest G. Schubert, secretary.

Mr. BARNES: I desire to offer in evidence certain portions of these exhibits. Of the first marked "State's Exhibit A" I
99 desire to offer in evidence the first part and then the rules in regard to the treasurer, that is one continued rule (handing Exhibit A to Judge Moran).
Judge MORAN: This is the first one mentioned?
Mr. BARNES: Yes, sir.

Judge MORAN:

(Q.) Mr. Kennedy, you say that Schubert has been secretary since when?
A. Since 1897.
Q. Since 1897?
A. Yes, sir.
Q. This part of the minutes here purports to be—the first one your attention was called to—purports to be the minutes of July 25, '93. Schubert was not at that time secretary?
A. No, sir.
Q. How are the records kept there?

Mr. BARNES: To that I object. I offer in evidence a certified copy by the secretary under the statutes. It is relevant evidence.
Judge MORAN: That don't make it relevant, if I can show there is no record kept.

The COURT: A certified copy of what?

Mr. BARNES: A certified copy of the minutes of the West Chicago park board kept by the secretary. Under the statute making a certified copy evidence I offer a certified copy. The only matters that may be gone into on cross-examination, I apprehend, is whether it is a certified copy.

The COURT: What do you say to that?

Judge MORAN: I say this: No person can by certifying
100 something to be a copy prevent me from showing that there is no such record on cross-examination. I have a right to show how the record was kept, if there was any such. Here is a record, certified, of matters occurring July 25, '93, certified by a secretary who, according to the witness, was not in office until 1897. Now, when he came to certify a thing he had to certify it from the original. If there is no original there can be no copy.

The COURT: That is quite true, but that is not the question presented here. The question is whether where the witness is called—and he has testified thus far simply, as I recall it, that the signatures to certain documents presented are those of the secretary of the board, who, he says, was secretary from 1897—isn't that all he has testified to?

Judge MORAN: Yes; except that he is assistant secretary of the board himself.

The COURT: Yes. The question that is presented now is not what you may be entitled to show at some time or what cross-examination you may make, but whether with this witness who testifies simply that he is assistant secretary of the board at the present time, and that Mr. Schubert was the secretary from '97 up to the present time, as I understand, and that the signature there is the signature of Mr. Schubert——

Judge MORAN: Now, it is a signature certifying to a matter of record.

101 The COURT: Yes, sir.

Judge MORAN: Which is offered, this witness on the stand simply saying that is the signature of the secretary. I wish to cross-examine for the purpose of showing that there is no record, no original record at all, none kept.

The COURT: I don't think that is admissible at all with this witness. He don't testify that there is any original record.

Judge MORAN: What is this?

The COURT: He testifies that this is the signature of somebody. That is all he testifies to, so I understood him. He says that is the signature of Mr. Schubert, who, he says, is the secretary of the board.

Judge MORAN (to the reporter): Have you got the question I asked him?

The question was read as follows: "Q. How are the records kept there?")

The COURT: I think the objection must be sustained.

Judge MORAN: I will ask another question then. Was there any record kept of a meeting; and, if so, in what form did it appear at the end of the meeting?

Which question was objected to by counsel for the People, and the objection was sustained by the court; to which ruling counsel for defendant then and there duly excepted.

Judge MORAN: We save an exception to both of those
102 rulings. That is enough to present the point.

Mr. BARNES: Now, I will read into the record——

Judge MORAN: Let it be understood that you read into the record what you want, and let that be the end of it, so as not to put this whole stuff in the record. I wish to object to anything being read from this and save the point on it.

The COURT: Yes, sir; that is substantially the same point you made before.

Mr. BARNES (reading from the exhibit):

"STATE'S EXHIBIT A."

"Board of West Chicago park commissioners.

Regular meeting, Tuesday, July 25th, 1893.

Official record.

Meeting called to order at 4.40 o'clock p. m., president John W. Garvy in the chair.

Roll-call.

The following members responded to the call of names: Commissioners Billings, Blount, Brodowski, Graham, Moll, Townsend, and President Garvy.

On motion of Commissioner Blount, seconded by Commissioner Moll, that the rules and by-laws as amended"——

Judge MORAN: If you will just read the page in the little pamphlet so as to get it identified.

Mr. BARNES: What I have just read strike out. From page 787 of the pamphlet offered in evidence I read:

"On motion of Commissioner Blount, seconded by Commissioner
Moll, that the rules and by-laws as amended be adopted and
103 500 copies printed, the ayes and noes were called, as follows:
Commissioner Billings, aye; Blount, aye; Brodowski, aye; Graham, aye; Moll, aye; Townsend, aye; President Garvey, aye—seven votes, aye.

Declared adopted.

The following are the rules and by-laws adopted as amended.

Rules and By-laws of the West Chicago Park Commissioners.

First.—Officers and terms of office.

SECTION 1. The officers of this board shall consist of a president, treasurer, auditor, and secretary, who shall be elected annually and hold their respective offices for one year and until their successors shall have been elected and qualified. Subject, however, to removal at the pleasure of the board.

Meetings.

SECTION 2. There shall be regular meetings of the board on the second and fourth Tuesdays of each and every month. The meeting on the second Tuesday of March shall be the annual meeting of the board.

Quorum.

SECTION 3. A majority of the board shall constitute a quorum for the transaction of all business, and in case there be no quorum present on the day fixed for the regular meeting, the commissioners present may adjourn the meeting from time to time until a quorum be obtained or may adjourn said meeting *sine die*.

Special meetings.

SECTION 4. The president of this board shall have power to call special meetings whenever he deems it expedient, and it shall be his duty to call special meetings of the board whenever a majority
104 of the members shall request him so to do. He shall state the object of such meeting, and no business shall be taken up or transacted at a special meeting except that referred to in such notice, unless with the consent of a majority of the whole board, expressed by their votes at such meeting.

Duties of the president.

SECTION 1. The president shall preside over all the meetings of the board; he shall preserve order and regulate discussion according to parliamentary law. In the absence of the president the board may elect a chairman *pro tem.*

Duties of secretary.

The secretary shall attend all meetings of the board or committees, whether regular or special; he shall keep in a book prepared for that purpose a true and complete record of the proceedings of said board, and shall have charge of all books, documents, and papers properly belonging to his office.

SECTION 2. He shall have the custody of the corporate seal, and shall attach the same to all documents which require sealing and which have been executed by the president, and he shall generally perform all the acts and duties ordinarily pertaining to the office of secretary.

SECTION 3. He shall draw all orders on the treasurer for all bills ordered paid by the board and all such orders shall be countersigned by the auditor.

Duties of treasurer.

SECTION 1. The treasurer shall act as financial agent of the
105 board for the receipt and distribution of its funds. He shall keep the moneys paid to him for and on account of the board, and the deposit account wherever kept shall be in the name of the board. He shall sign all checks drawn by him for account of the

board. He shall see that the books of account are kept in proper form and correctly, and will in all cases at once, upon his discovering any delinquencies in the account of any officer of the board, report the same in writing, with the name of the delinquent, to the board.

SECTION 2. He shall pay all orders signed by the secretary and countersigned by the auditor, and he shall pay no order which has not been so signed and countersigned.

SECTION 3. He shall cause all vouchers paid by me to be filed and properly preserved. He shall file with the secretary, on or before the 5th day of each and every month, a detailed statement of the receipts and disbursements of the board for the preceding month, and his books and papers shall at all times be open to the inspection of any member of the board."

"On motion, the board adjourned *on* 7.30 o'clock p. m.

THOMAS J. O'NEILL, *Secretary.*"

To which is attached the following certificate:

"STATE OF ILLINOIS, } ss:
County of Cook, }

I, Ernest G. Schubert, secretary for the West Chicago park commissioners, do hereby certify that I am the keeper of the official records and minutes of the meetings of the West Chicago park
106 commissioners, and that the above and foregoing printed pamphlet entitled 'Board of West Chicago park commissioners, regular meeting, Tuesday, July 25th, 1893,' is a correct, just, and true copy of the original official record and minutes of said meeting held by said board of West Chicago park commissioners on the date last aforesaid; which original official record and minutes are kept by me as such secretary in the office of said board.

In witness whereof I hereunto subscribe my name and affix the corporate seal of said West Chicago park commissioners this the tenth day of June, A. D. 1898.

ERNEST G. SCHUBERT, *Secretary.*"

To which is attached the seal of the board.

107 Q. I now offer in evidence "Exhibit B," and will read portions from the same as before, subject to the same objections and exceptions.

Judge MORAN: I make the same objections, your honor, and save an exception.

The COURT: It is understood that your objection goes to all these documents which he is now reading from.

Judge MORAN: And exception?

The COURT: Yes, sir.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES (reading from exhibit):

"Board of West Chicago park commissioners.

Annual meeting, Tuesday, March 13th, 1894.

Official record published by authority of the board of West Chicago park commissioners.

Meeting called to order at 4.20 o'clock p. m., President Garvy in the chair.

Roll-call.

The following members responded to call of names: Commissioners Blount, Brodowski, Graham, Moll, Townsend, President Garvy."

I read from page 956:

"The next in order being the election of officers for the ensuing year, the president requested Commissioner Blount to preside as chairman. Commissioner Blount in the chair."

(Page 957:)

108 "The chairman announced that nominations for the office of treasurer were in order. Commissioner Blount nominated Edward S. Dreyer for treasurer of the board. The nomination was seconded by Commissioner Brodowski. No other nominations being made, the chairman requested the commissioners to cast their ballots for treasurer of the board for the ensuing year. The ballots were collected by the teller and the vote announced as follows: Total vote cast, 7; for Edward S. Dreyer, 7 votes. The chairman declared Edward S. Dreyer duly elected treasurer of the board for the ensuing year."

(Passing to page 960:)

"On motion of Commissioner Townsend, seconded by Commissioner Graham, the board adjourned at 6.45 p. m.

THOMAS J. O'NEILL, *Secretary*."

To which is appended the following certificate—shall I read these certificates every time?

Judge MORAN: Just say a similar certificate. They are all alike, I think.

Mr. BARNES: Yes, sir; with the exception, of course, of inserting the date; to which is appended a certificate, the same as attached to "Exhibit A," with the exception of the date of the meeting, that corresponding with what has been read from the exhibit.

I now read from "Exhibit C:"

"Board of West Chicago park commissioners.

Annual meeting, Tuesday, January 8th, 1895.

109 Official record published by authority of the board of West Chicago park commissioners"——

Judge MORAN: I save the same objection and exception here.

Which objection was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES (reading):

"Meeting called to order at 7.45 p. m., President Moll in the chair. Roll-call.

Present: Commissioners Bogle, Graham, Oliver, Uihlein, Vopicka, Weeks, President Moll.

Minutes of the meeting held Tuesday, December 18th, 1894, were, on vote, approved as printed.

President Moll asked the pleasure of the board in reference to proceeding with the election of officers.

On motion of Commissioner Graham, seconded by Commissioner Bogle, that the election of officers be postponed for two weeks, the ayes and noes were called, as follows: Commissioner Bogle, aye; Commissioner Graham, aye; Commissioner Oliver, no; Commissioner Uihlein, no; Commissioner Vopicka, no; Commissioner Weeks, no; President Moll, no. Five votes no; two votes aye. Declared lost."

(Page 1149:)

"The president appointed Commissioner Vopicka teller, and declared nominations for president to be in order.

Commissioner Oliver nominated Mr. Harvey T. Weeks for president of the board. Nomination seconded by Commissioner Uihlein.

No other nominations being made, the chairman requested
110 the commissioners to cash their ballots for president of the board for the ensuing year. The ballots were collected by the teller and the vote announced as follows: Total ballots cast, 7. For Harvey T. Weeks, 4 votes; for Andrew J. Graham, 1 vote; two blank. The chairman declared Mr. Harvey T. Weeks duly elected president for the ensuing year. President Weeks in the chair. The chairman announced that nominations for secretary were in order. Commissioner Uihlein nominated Mr. Edward S. Dreyer for treasurer of the board. Nomination seconded by Commissioner Vopicka.

On motion of Commissioner Graham, seconded by Commissioner Oliver, it was on vote ordered that the secretary cast one ballot as the vote of the board for Edward S. Dreyer for treasurer of the board for the ensuing year. The ballot was cast by the secretary and the chairman declared Edward S. Dreyer duly elected treasurer for the ensuing year."

(Passing to page 1153:)

"And the board stood adjourned.

"HARRY WILKINSON, *Secretary.*"

To which is attached a certificate, the same as "Exhibit A," with the exception that it refers to the exhibit just read instead of that exhibit.

111 Q. I now offer in evidence "State's Exhibit D."

"Board of West Chicago park commissioners.

Adjourned regular meeting, Monday, December 30th, 1895.

Official record published by authority of the board of West Chicago park commissioners.

Meeting called to order at 7.30 o'clock p. m., President Weeks in the chair.

Roll-call.

Present: Commissioners Bogle, Graham, Moll, Oliver, Uihlein, Vopicka, and President Weeks; absent, none."

(Page 1453:)

"The president announced the election of officers to be in order.

Whereupon Commissioner Graham introduced the following resolution:

Resolved, That the secretary cast one ballot as the vote of this board for the following-named gentlemen for the positions set opposite their respective names for the ensuing year and at the salaries herein stated, viz: Harvey T. Weeks, president; Edward S. Dreyer, treasurer."

Nothing opposite their names.

"On motion of Commissioner Moll, seconded by Commissioner Uihlein, that the resolution be adopted, the ayes and noes were called, as follows: Commissioner Bogle, aye; Graham, aye; Moll, aye; Oliver, aye; Uihlein, aye; Vopicka, aye; President Weeks, aye. Seven votes, aye. Declared carried. The ballot was cast by the secretary. as directed in said resolution, and the president thereupon declared the officers and other employees named in the
112 resolution duly elected for the ensuing year.

On motion of Commissioner Graham, seconded by Commissioner Oliver, the board adjourned — 8.20 o'clock p. m.

GEORGE F. TALTY, *Secretary.*"

To which is attached a proper certificate by Ernest G. Schubert, with the seal, as in the case of the other exhibits.

Judge MORAN: I would like to have a little more of that table read there. You might as well do it now. You stopped there. I would like to have the jury see that.

Mr. BARNES: I will read it if you want it. I am reading nothing only what pertains to Mr. Dreyer, but I will read it.

Judge MORAN: Let the jury see that.

Mr. BARNES: There were other officers elected at the time besides those named, and the salaries were specified, and there is no salary opposite Harvey T. Weeks or Edward S. Dreyer or John Milton Oliver. All the other officers named have salaries opposite their names.

Judge MORAN: There is no salary for president, treasurer, or auditor. The other officers of the board get salaries.

Mr. BARNES: That is, they are named in the resolutions.

Judge MORAN: The salaries are fixed. The president, treasurer, and auditor get no salaries.

Mr. BARNES (reading from Exhibit "E"):

"Board of West Chicago park commissioners.

113 Special meeting, Monday, December 21st, 1896.

Official record published by authority of the board of West Chicago park commissioners.

Meeting called to order at 7.45 o'clock p. m. by the secretary.

Roll-call.

Present: Commissioners Bogle, Graham, Moll, Uihlein, and Vopicka. Absent: Commissioner Oliver and President Weeks.

The secretary announced that by direction of Commissioners Bogle, Graham, Moll, Uihlein, and Vopicka he had issued the following call for the meeting:

"CHICAGO, *December* 21*st*, 1896.

Commissioner ——.

DEAR SIR: I beg to notify you that a special meeting of the West Chicago park commissioners will be held at the office, in Union park, this evening, at 7.30 o'clock, for the purpose of taking appropriate action in respect to the financial failure of our treasurer, Mr. E. S. Dreyer.

Yours very truly, GEORGE F. TALTY, *Secretary*."

On motion of Commissioner Graham, seconded by Commissioner Bogle, it was on vote ordered that the call be placed on file.

On motion of Commissioner Graham, seconded by Commissioner Bogle, that Commissioner Moll act as president during the absence from the city of President Weeks, the ayes and noes were called, as follows: Commissioner Bogle, aye; Graham, aye; Moll, —; Uihlein, aye; Vopicka, aye. Four votes, aye. Declared carried.

114 Commissioner Moll in the chair. The following communication was presented.

CHICAGO, *December* 21*st*, 1896.

West Chicago park commissioners.

GENTLEMEN: I herewith tender my resignation as treasurer of your board.

Respectfully, E. S. DREYER."

Judge MORAN: I object to that, your honor. That recites that "the following communication was presented." It don't appear who presented it or that it was signed by Mr. Dreyer or anything else. You cannot get in a resignation in that way.

Mr. BARNES: I take it that the minutes are only evidence of the action of the board, that's all.

The COURT: That's so. That is all that this is evidence of, that the paper containing the matter that is set forth therein was presented at that meeting. It does not show that it was either sent or signed by Mr. Dreyer.

Judge MORAN: Therefore it is not competent.

The COURT: It is competent as a part of the proceedings of that meet-, that is all, but it does not show at all—the proceedings don't show that this was either sent or signed by the defendant or that the defendant ever had any knowledge of it.

Judge MORAN: Then as against the defendant such a record cannot be made. It is of no consequence and immaterial. If they

took action as a board, of course their record is competent.
115 But this is offered now, your honor, as against Dreyer.

Mr. BARNES: It is offered for the purpose of showing the election of officers only, and that shows here. Here is a special meeting. A special meeting was called. Here is a new officer elected—Mr. Blount. Now, it is offered merely for the purpose of showing why Mr. Blount was elected. Your honor will notice that it follows right up with the statement that the resignation of Mr. Dreyer was accepted, I think—something of that kind. Then they proceeded to fill the vacancy. Now, it is all competent to show the action of the board in declaring a vacancy and filling one. That is competent. But it is not contended by the State that it is at all binding upon Mr. Dreyer as to whether he signed or sent in the resignation or authorized anybody else to. It is not introduced for that purpose.

Judge MORAN: No recitation in the records of the board without any action in reference to Mr. Dreyer is competent. The evidence here is offered against him. It can't be made competent. Any resolution that the board adopts for electing officers is competent, but you cannot justify the action of the board by showing any sort of recitation. They cannot give themselves power by a recitation of any kind. They cannot give themselves power to act by a recitation of any kind. That can only be shown, your honor, by original evidence; that's the only way. It can be shown by original evidence. Now, they can go on and show their meeting. This
116 meeting was offered once before, but it was never contended that this was competent.

The COURT: What you say is quite true; that they cannot give themselves any power or authority by a recitation. Nevertheless, they may have taken action——

Judge MORAN: That is true, your honor.

The COURT: Which was accepted and upon which other parties acted—that is to say, the defendant may have.

Judge MORAN: Then the action can be shown—their action can be shown; but I want to call your honor's attention to the distinction between their reciting something about the defendant. Of course, it is perfectly competent to prove the defendant's acts. If this thing they have attempted to recite amounts to nothing, of course, it is immaterial evidence and ought to be excluded as such.

The COURT: Unless hereafter they should show that this communication was either sent or signed by Mr. Dreyer. Then it would be competent.

Judge MORAN: If counsel will undertake to show that this was either sent or signed by Mr. Dreyer hereafter, I understand that is your honor's ruling.

The COURT: Yes, sir.

Judge MORAN: If it is admitted upon that undertaking——

The COURT: That letter, which purports to be from Mr. Dreyer, I don't think can be admitted unless it shall be shown here-
117 after that it was either sent, acknowledged, or signed by Mr. Dreyer.

Mr. BARNES: Well, I will not introduce that at present.

Judge MORAN: Let that be stricken out and let counsel introduce it again when they are ready to make their proof.

Mr. BARNES: Well, I will read that part that is stricken out: "The following communication was presented," and the communication itself.

Judge MORAN: Yes, sir.

Mr. BARNES: Now follows this:

"Whereas it has come to the knowledge of this board that checks drawn on the treasurer of this board, duly signed and executed by the proper officers of this board, have been returned to the secretary for want of payment, therefore be it

Resolved, That the resignation of Edward S. Dreyer as treasurer of the West Chicago park commissioners be accepted and said office declared vacant.

On motion of Commissioner Graham, seconded by Commissioner Vopicka, that the resolution be adopted, the ayes and noes were called as follows: Commissioner Bogle, aye; Graham, aye; Uihlein, aye; Vopicka, aye; Chairman Moll, aye. Five votes aye. Declared carried.

Commissioner Graham introduced the following resolution:

Resolved by the West Chicago park commissioners, That Fred M. Blount be, and he is hereby, elected treasurer of this board to
118 fill the unexpired term of Edward S. Dreyer, removed, and that he be required to furnish a bond in the sum of $500,000, with three sureties to be approved by the circuit court of Cook county.

On motion of Commissioner Bogle, seconded by Commissioner Vopicka, that the resolution be adopted, the ayes and noes were called as follows: Commissioner Bogle, aye; Graham, aye; Uihlein, aye; Vopicka, aye; Chairman Moll, aye. Five votes aye. Declared carried.

The secretary thereupon presented bond of Fred M. Blount, as treasurer of the West Chicago park commissioners, in the sum of $500,000, dated December 21st, 1896, with John R. Walsh, Maurice Rosenfeld, and John M. Smyth, as sureties, approved by R. S. Tuthill, judge circuit court of Cook county.

On motion of Commissioner Graham, seconded by Commissioner Bogle, that the bond be accepted and placed in the custody of the acting president, Commissioner Moll, the ayes and noes were called as follows: Commissioner Bogle, aye; Graham, aye; Uihlein, aye; Vopicka, aye; Moll, aye. Five votes aye. Declared carried."

(Page 1782 :)

"On motion, the board adjourned at 8.30 o'clock p. m.

GEORGE F. TALTY, *Secretary*."

To which is attached a certificate by Ernest G. Schubert, secretary, with the seal, the same as to the preceding exhibits, except as to the date of the meeting, which corresponds with the beginning of the exhibit read.

119 Q. (Document shown witness.) I will show you—look again at Exhibit F, and whose signature is that appended to that certificate?

A. Signature of Ernest G. Schubert, secretary.

Q. (Document shown witness.) And look at Exhibit G and state whose signature that is?

A. The signature of Ernest G. Schubert, secretary.

Q. (Document shown witness.) And H?

A. Signature of Ernest G. Schubert, secretary.

Mr. BARNES: I read from State's Exhibit F (reading from the exhibit):

"Board of West Park commissioners.

Regular meeting, Tuesday, April 13th, 1897.

Official record (published by authority of the board of West Chicago park commissioners).

Meeting called to order at 5 o'clock p. m. by the president.

Roll-call.

Present: Commissioners Blount, Eggert, Graham, Pavlicek, Petersen, Suddard, and President Wilson. Absent: None."

On page 1856 of such exhibit (reading):

"On motion of Commissioner Blount, seconded by Commissioner Eggert, it was, on vote, ordered that the election of officers be proceeded with. Commissioner Pavlicek nominated Commissioner Suddard for president.

120 "No other nominations being made, on motion of Commissioner Blount, the secretary was directed to cast one ballot as the vote of the board in favor of Joseph W. Suddard for president.

"Ballot was accordingly cast by the secretary, and Commissioner Suddard was declared duly elected president of the board.

"Commissioner Graham nominated Commissioner Blount for treasurer of the board.

"No other nomination being made, it was, on vote, ordered that the secretary cast one ballot as the vote of the board in favor of F. M. Blount for treasurer.

"The ballot was accordingly cast by the secretary and Commissioner Blount was declared duly elected treasurer of the board."

Page 1859 (reading):

"On motion, the board adjourned at 6.30 o'clock p. m.

GEORGE F. TALTY, *Secretary.*"

To which is attached the certificate of Ernest G. Schubert, the same in form as the others, and in substance, with the exception of the date of the meeting, it corresponds with that at the beginning of the exhibit read.

I read from State's Exhibit G.

Mr. MORAN: This was F you just read?

Mr. BARNES: I just read from F.

(Reading:)

"Board of West Chicago park commissioners.

"Regular meeting, Tuesday, January 11, 1898.

"Official record (published by authority of the board of West
121 Chicago park commissioners).

"Meeting was called to order at 4.50 o'clock p. m. by the president.

"Roll-call.

"Present: Commissioners Blount, Eggert, Graham, Petersen, Pavlicek, Wilson, and President Suddard. Absent: None.

"On motion of Commissioner Blount, seconded by Commissioner Petersen, it was, on vote, ordered that the regular order of business be suspended for the purpose of electing officers for the ensuing year.

"Commissioner Blount nominated Mr. Joseph W. Suddard to succeed himself as president.

"No other nomination being made, on motion of Commissioner Blount, the secretary was directed to cast one ballot as the vote of the board in favor of Mr. Suddard as president. The ballot was accordingly cast by the secretary, and Commissioner Suddard was declared duly elected president of the board.

"Commissioner Suddard put in nomination Commissioner Blount as treasurer of the board.

"No other nominations being made, it was, on vote, ordered that the secretary cast one ballot as the vote of the board in favor of F. M. Blount for treasurer.

"The ballot was accordingly cast by the secretary, and Commissioner Blount was declared duly elected treasurer of the board."

122 Page 2067:

"On motion, the board adjourned to 7 o'clock p. m.

ERNEST G. SCHUBERT, *Secretary.*"

To which is attached the certificate of Ernest G. Schubert, the same *as* in form as the preceding certificate and in substance, with the exception of the date of the meeting, and that corresponds with the exhibit as read.

Mr. MORAN: Your honor understands that there is this objection and exception continued all along to all of these.

The COURT: Oh, yes; certainly; all of them.

Mr. BARNES: That can be inserted.

I read from State's Exhibit H (reading):

"Board of West Chicago park commissioners.

"Regular meeting, Tuesday, January 10, 1899.

"Official record (published by authority of board of West Chicago park commissioners).

"Meeting called to order at 4.30 o'clock p. m. by the president.

"Roll-call.

"Present: Commissioners Eggert, Graham, Pavlicek, Petersen, Wilson, and President Suddard. Absent: Commissioner Blount."

Page 2213 (reading):

"Commissioner Pavlicek nominated Mr. Joseph W. Suddard to succeed himself as president for the ensuing year, the said nomination being seconded by Commissioner Eggert."

123 Preceding that is this: "On motion of Commissioner Wilson, seconded by Commissioner Petersen, it was, on vote, ordered that this board will now go into executive session.

"On motion of Commissioner Pavlicek, seconded by Commissioner Eggert, that this board do now proceed with the order of election of officers and employés for the ensuing year; whereupon the president appointed Commissioners Eggert and Wilson as tellers.

"Commissioner Pavlicek nominated Mr. Joseph W. Suddard to succeed himself as president for the ensuing year, the said nomination being seconded by Commissioner Eggert.

"No other nominations being made, on motion of Commissioner Pavlicek, the secretary was directed to cast one ballot as the vote of the board in favor of Mr. Suddard as president.

"The ballot was accordingly cast by the secretary, and Commissioner Suddard declared duly elected president of the board.

"Commissioner Graham put in nomination Commissioner Blount as treasurer of the board.

"No other nominations being made, it was, on vote, ordered that the secretary cast one ballot as the vote of the board in favor of F. M. Blount as treasurer.

124 "The ballot was accordingly cast by the secretary, and Commissioner Blount declared duly elected treasurer of the board.

"Commissioner Eggert nominated Ernest G. Schubert as secretary of the board.

"No other nominations being made, on motion of Commissioner Pavlicek, the president was directed to cast one ballot, as the vote of the board, in favor of Mr. Schubert for secretary.

"The ballot was accordingly cast and Ernest G. Schubert declared duly elected secretary of the board for the ensuing year."

Page 2216 (reading):

"On motion, the board adjourned at 6.20 p. m.

"ERNEST G. SCHUBERT, *Secretary.*"

To which is attached the certificate of Ernest G. Schubert, secretary, the same as the others, the only difference being the date of the meeting, as the time of the regular meeting, and that corresponds with the exhibit as read.

125 Q. Mr. Kennedy, who was the acting treasurer of the West park board in the year 1894, after March 13th?

A. E. S. Dreyer.

Q. Who was the acting treasurer during the years 1895 and 1896, up to December 21st, 1896?

A. E. S. Dreyer.

Q. Who was the acting treasurer after December 21, 1896, on and after that time?

A. F. M. Blount.

Mr. MORAN: Wait a minute. I object to that—I object to that.

Mr. BARNES: Why?

Mr. MORAN: Why, because—acting treasurer. They can prove that Dreyer was acting treasurer; that is against him. If he acted as treasurer I suppose it wouldn't make so much difference whether he was qualified and elected or not; but somebody else as acting treasurer is not competent. They must show there was a regular treasurer there. They have done it, and if they have that is all there was to it.

Mr. BARNES: Well, we are entitled to show acting treasurer also, because any action by Mr. Blount, as treasurer, would be binding upon the board and anybody with whom he dealt.

The COURT: I think you can show, probably, that in addition to an election of officers that an acting would be an acceptance.

Mr. MORAN: Well, qualification would be acceptance.

The COURT: Well, an acting would show an acceptance.

126 Mr. MORAN: I know, but that would not bind anybody else. If a person is charged with acting he cannot say then that that acting is all right, but when you come to show somebody else's action to hurt that person you must show that they are regularly authorized—not acting.

The COURT: Well, in this case they are bound to show, I think, not only that Mr. Blount was elected treasurer, but that he accepted the office. Now, an acting would be an acceptance of the office.

Mr. MORAN: Well, this board can only show what it did by its resolutions. It speaks only by its records; can speak in no other way.

The COURT: Yes.

Mr. MORAN: Now, counsel has introduced the record showing the election of Mr. Blount; so far, so good. You can't show anything else against us but the election of a regular treasurer, elected by the board; can't show an acting treasurer.

The COURT: Well, you can show the acceptance of the office.

Mr. MORAN: Well, you show the acceptance of the office by showing qualifications. He cannot accept the office without accepting it according to law. Acting without qualification would charge nobody else at all; it might charge him if he was complained against.

The point is it cannot charge anybody else. You see it is
127 not offered, your honor, to sustain—it is not offered against the person who is said to be acting at all.

The COURT: No. The only purpose that I can conceive it to be for would be to show his acceptance. If he goes on and acts, that is equivalent to saying, "I accept."

Mr. MORAN: Well, they have read the record of his election in 1896, in 1897, in 1898, and in 1899—election by the board. Now, they prove the election of Dreyer. They also prove Dreyer's actions as treasurer. I did not object to that because I think that was competent. Prove the instant that he acted in a certain capacity, and he may be estopped from his action; nobody else is estopped from his action; only stops him.

Mr. BARNES (to Mr. Moran): Let me ask you a question, Judge.

Supposing there was any irregularity at all in regard to Mr. Blount's election; supposing there was any irregularity in regard to his qualification; but all these years he had been acting as treasurer of the board; he had received its funds; he had paid out its funds; he had accepted drafts; he had made payments in the name of the board, as treasurer of their funds; would it be contended for one single moment here that because there was a little irregularity or a little slip somewhere in his qualification that he was not authorized, while acting for the board and recognized as the board's rep-
128 resentative—that he was not authorized to act in the capacity in which he was allowed to act? That is the point.

Mr. MORAN: Certainly it would; that is just the very point, your honor. Now, the only purpose of showing Mr. Blount in as treasurer at all is to show, I suppose—I conceive of no other purpose—to show a legal demand by Blount on Dreyer for the money. That is this statute; he must pay it over to his successor. That means his successor duly elected and qualified. No other person under this act can make the demand, no matter whether he is acting or not.

Mr. BARNES: The statute don't say that—says his successor.

Mr. MORAN: His successor. That is not somebody acting. His successor, as qualifying——

Mr. BARNES: There, now, is just the point of difference between us.

Mr. MORAN: Let me read it.

The COURT: It is his successor. Isn't that the way the statute reads?

Mr. MORAN: "Made by his successor in office."

The COURT: Yes.

Mr. MORAN: "By his successor in office."

The COURT: That was my recollection of it.

Mr. MORAN: That is not an acting person at all; that is a person duly qualified. It would be a crime for a man to pay over
129 the money. He could not discharge himself by paying over money to anybody who was not duly elected and qualified.

Mr. BARNES: It is not anything of which the defendant could complain if the board recognized Mr. Blount as treasurer?

Mr. MORAN: No. If your honor please——

The COURT: I have no doubt but what it is the successor, but the successor duly elected and accepted?

Mr. MORAN: "Duly elected and qualified," your honor.

The COURT: I would not put in the word "qualified."

Mr. MORAN: Well, let's see. Suppose a man is elected treasurer of a board and does not give a bond?

The COURT: The qualification is not prescribed by the statute; it is a matter for the board.

Mr. MORAN: No, your honor; it is prescribed for the board.

The COURT: Well, I say it is not prescribed for the statute; it is a matter for the board.

Mr. MORAN: Exactly. Well, can a man be an officer of the board without he has complied with its rules and regulations?

The COURT: That is for the board to determine.

Mr. MORAN: I don't think so. Here is a public board—a municipal board.

The COURT: It is for them to determine. They pass upon the sufficiency of the bonds.

130 Mr. MORAN: No, sir.

The COURT: Not in this case. But what I meant to say is, they pass upon the amount of the bonds.

Mr. MORAN: That don't make any difference. The law prescribes how this qualification is to be made, and it is by the judge of the circuit court that this bond must be passed upon.

The COURT: As to the sufficiency of it.

Mr. MORAN: Well——

The COURT: Not as to the amount.

Mr. MORAN: That don't make any difference.

Mr. BARNES: Now, to reach the nut of this treasurer question, let us suppose that the court never approved of the bonds, and yet Mr. Blount had gone on acting as treasurer all the time, the board had recognized him, they had put its moneys into his hands, they had drawn upon him and he had paid the money out as treasurer, he had acted as treasurer, he had signed checks as treasurer, and the time came for him to make a demand upon his predecessor for the funds of the same character and account that had been coming into his hands and had been used by him—would it be contended for a single moment that the man can escape all liability on the ground that there was a mere formal defect or something of the kind in the qualification of his successor when the successor was acting as treasurer. There is the point. If it can be con-

131 tended in that way, then the man can watch his opportunity and see whether his successor conforms with every legal qualification, and refuse to hand over the money, and be justified in withholding it and spend it.

Mr. MORAN: Well, let's see, your honor, let's see. Here is a municipal corporation; it has a treasurer. The law prescribes that he shall give a bond, and the law prescribes that he shall prove the sufficiency of that bond. He is not treasurer by his election, nor he is not treasurer by acting. He is only treasurer by election and qualification and qualification according to law. Now, suppose a man is acting treasurer, he can be acting treasurer without being elected at all; no qualification necessary to an acting treasurer any more than there is to an acting justice of the peace. If he is acting merely he needs no election and no qualification, and an election is no more, makes no more, a treasurer than a qualification without election does. Suppose I go and give a bond now to the West park board as treasurer, a bond formal in every respect, and your honor as judge of the circuit court approves of that bond, says it is sufficient, can I go and demand the moneys of the board?

Mr. BARNES: You wouldn't be acting, Judge.

Mr. MORAN: I would be acting. Acting is going and getting the money of the board.

Mr. BARNES: No; acting means more than that; it means the

recognition of the party as treasurer who is doing it. I
132 will put this question to you, Judge: Are not the acts of *de facto* officers just as binding on everybody as acts of officers *de jure?*

Mr. MORAN: The acts of acting officers are binding when they are collateral conduct.

Mr. BARNES: When they are collateral conduct?

Mr. MORAN: Yes. Now, here you undertake to show a man acting. If that man, Blount, has given a bond to this board—qualified himself to make a demand——

Mr. BARNES. Well, is this a proceeding attacking the regularity of Mr. Blount's conduct? Isn't it rather a proceeding, rather, attacking the irregularity of the other treasurer?

Mr. MORAN: What is the rule of law, now? Dreyer, as treasurer, was bound under the law to deliver to his successor in office the funds of this board. He never was bound to deliver it to his successor in office if he was elected and qualified according to law, and a demand by anybody not elected and qualified according to law is a demand that he must disregard if he had the money in his hand. He must disregard it. Why? Because all the board has to do is to qualify their treasurer; they can do it in ten minutes; they can do it in an hour. They can qualify their treasurer, but they cannot
put a man in danger of the penitentiary by not qualifying an
133 officer as his successor. Now, there is the trouble of it. I supposed—I always supposed—that Mr. Blount had qualified. If he has not qualified, and he made a demand, it is good for nothing, your honor. We have been over this demand question once.

Mr. BARNES: You ask me if Mr. Blount has qualified? He has, but, as a matter of fact, Mr. Blount has never given any bond but his original bond on the theory, as contended by them, that bond holds good to this day, and he is acting under it. Well, now, I apprehend that a collateral question of that kind is not one that could be raised in this proceeding, and I apprehend that whether Mr. Dreyer was regularly qualified exactly as was contemplated in every respect is entirely a collateral proceeding that cannot be attacked. The judge has well said that they cannot attack the acts of officers *de facto* in collateral proceedings or collateral acts. Now, wouldn't it be an attack upon Mr. Blount's qualifications or his office as to whether he was strictly qualified or not to stop and inquire here in a proceeding under an indictment against the defendant whether Mr. Blount had strictly complied with the letter of the law in all respects. Now, it is our contention that you cannot go into that inquiry in this case. It is out contention that if there are any irregularities with regard to Mr. Blount's qualification—if he should, in
fact, by the letter of the law be required to give a new bond each
134 year—that that in nowise affects the legality of his acts as long as he continues to be the treasurer, the acting treasurer, the only treasurer of the West park commissioners, and that all of his acts as such treasurer are binding upon everybody else, and while acting as such treasurer—while such *de facto* treasurer, if he is not a *de jure* treasurer—he makes a demand upon the defendant in

this case as the successor of this defendant, the legality of that demand cannot in any way be questioned by inquiring into the qualifications of Mr. Blount, if he was the acting treasurer and the *de facto* treasurer.

Mr. MORAN: The trouble with it is this: My learned friend does not recognize the principle of law that controls. Nobody is bound to submit to a *de facto* officer at all—he is not bound to submit to a *de facto* officer. If an officer comes here and says, "I am acting; I want you to do so and so," I can say, "Sir, you are not an officer, and I will not submit to you. Your acting don't affect the thing." And if I submit, your honor, if I pay over money to a *de facto* officer, it may be that my acquiescence in it makes it all right, but I am not bound to do it. Nobody is bound to recognize the *de facto* officer. The principle that his acts, when done, will amount to acts that will be binding is not the question here—it is not the question.

135 The COURT: Well, I do not agree with you, Judge Moran, but nobody is required to submit to a *de facto* officer. I think when a man has a commission, although it was improperly granted to him, then acts under the commission—then he is bound to submit to him.

Mr. MORAN: That is a *de jure* officer if he has got the commission.

The COURT: No. His commission may be improperly obtained, and there may be a proceeding to take it away from him; and a man is bound to submit to the man who has the commission from the body who is authorized to give the authority and who is acting, and he cannot raise the question that this man, perhaps, did not receive the requested number of votes, or that there was some irregularity——

Mr. MORAN: Oh, no; he can't go to his election—can't inquire into that—but he can——

The COURT: Now, in this case the case is not as you suggest, in which you simply called this the treasurer of the West park board, or anybody else, and thereupon call upon people to pay you money. Then you would not be bound to at all; but the case submitted here is one in which the records of the West park board show that Mr. Blount was duly elected treasurer. That is the case. He has the action of the board making him the treasurer, and upon that he proceeds to act.

136 Mr. MORAN: He must be qualified, your honor, and he must be qualified before he can insist on any act. He is not entitled to receive any of the moneys of the board from any person in whose hands it is until he is qualified. Suppose a man comes demanding—after he is elected—look at it. Here is one man who has filled one term. Suppose there is no trouble about the money at all, and there is a man who has filled the term and he has no bond. Now, then, at the end of his term the liability upon his bond continues until he discharges himself by the payment of the money to a proper person. Now, then, a man comes to me and says, "I am elected treasurer of this board as your successor; pay over your money

to me and discharge yourself." I pay over the money when I know that that man has not qualified—have not given bond. Why, your honor, it would be criminal to do it.

The COURT: Why, no; it wouldn't do for him simply to accept the word of the man.

Mr. MORAN: No. Suppose he brought a certificate of election to him and said, "I have been elected; there is the vote that elected me. I am elected treasurer. Now, I come to you, and I want the money in your hands that you are liable for under your bond." The man says to him, "Have you given the bond; have you qualified?" "No; I have not qualified." Is he to receive the money of the municipality from the treasurer, who is liable upon the
137 bond in whose hands it is? Acknowledge that he has not qualified. He is not the successor in office at all by election; he is successor by qualification and election, and I can cite, your honor, authorities on it. There is no question.

The COURT: That depends on what the terms of the election are.

Mr. MORAN: Yes; the election and qualification of the successor in office.

Mr. BARNES: Then, if he was not duly qualified he could have no successor for four years?

Mr. MORAN: No, sir; he is not successor until the successor is elected and qualified. It is not possible.

Mr. BARNES: And a man acting as a *de facto* officer is no——

Mr. MORAN: No matter whether he is acting or not.

The COURT: I think the question may be answered as to who was acting as treasurer in certain years.

Mr. MORAN: I object. I want to put in a further objection that it can only be shown by the records of the board who was the treasurer of the West Side board of park commissioners—only by the record. You cannot show it by parole testimony.

The COURT: Well, the court doesn't understand that question is before the court. Therefore the objection is overruled.

Mr. MORAN: Well, this man is asked to state, not from
138 the record.

The COURT: He is asked to state who acted.

Mr. MORAN: Exactly. Now, I say he cannot prove it in that way. Save an exception on both points.

To the ruling of the court in overruling his objections aforesaid the defendant, by his counsel, then and there duly excepted.

The COURT: He may answer the question.

Mr. BARNES: The question is, who acted as treasurer from December 21st, 1896, of the board of West park commissioners up to the present day?

To which question the defendant, by *its* counsel, reiterated his objection; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

A. F. M. Blount.

Q. Fred M. Blount?
A. Yes, sir.

Mr. MORAN: To save the point further, your honor, I ask that that be stricken out.

The defendant, by his counsel, moved that the answer of the witness be stricken out; which motion was overruled and denied by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES:

139 Q. Have you, as assistant secretary, the bonds given by the treasurer?
A. Yes, sir.
Q. Have you the bonds that were given by the treasurer with you?
A. Yes, sir.
Q. Treasurers Dreyer and Blount?
A. Yes, sir.
Q. Will you produce them?

(The witness in response to the question produced several documents and handed them to the assistant State's attorney.)

Q. (One of the papers produced by the witness shown to the witness.) Whose signature is that?

Mr. MORAN: We admit, your honor, the signatures to those three bonds that Mr. Barnes offers. The first is dated the 19th of March, 1894. We admit the signatures to that. The signatures, perhaps, ought to be read in now on these papers——

Mr. BARNES: I will now——

Mr. MORAN: Which you will put in evidence?

Mr. BARNES: Yes; which we put in evidence.

Mr. MORAN: We will put in the signatures now—Edward S. Dreyer, George Schneider, and George A. Weiss on the first bond. We will admit the signatures on the next bond. What is that?

Mr. BARNES: Well, the next bond in date is January 21st, 1895, isn't it?

Mr. MORAN: Yes; January 21st, 1895. We admit the signatures on that bond—Edward S. Dreyer, George A. Weiss, George
140 Schneider—and I guess we admit the signatures on the third bond which Mr. Barnes hands me.

Mr. BARNES: That is dated January 24th, 1896.

Mr. MORAN: January 14th, 1896.

Mr. BARNES: January 14th, 1896; yes.

Mr. MORAN: The signatures we admit to that bond. They are Edward S. Dreyer, George Schneider, Hempstead Washburne, Philip Henrici. Approved by Murray F. Tuley, judge of the circuit court.

Mr. BARNES: Now I would like, if the court please, to substitute copies for those three bonds.

Mr. MORAN: No objection.

Mr. BARNES: And we will mark them State's Exhibits "I," "K," and "L" respectively.

Mr. MORAN: Have you compared them to know if they are true copies?

Mr. BARNES: Well, I will do so. I think I did before, but I will do so.

The bonds referred to and introduced in evidence, being State's Exhibits "I," "K," and "L" respectively, are in words and figures as follows, to wit:

141 STATE EXHIBIT "I."

"Know all men by these presents that we, Edward S. Dreyer, as principal, and George Schneider and George A. Weiss, as sureties, all of the county of Cook and State of Illinois, are held and firmly bound unto the West Chicago park commissioners in the sum of five hundred thousand (500,000) dollars, good and lawful money of the United States of America; for the payment of which sum, well and truly to be made, we and each of us bind ourselves, jointly and severally, and our respective heirs, executors, administrators, successors, and assigns, firmly by these presents.

Signed, sealed, and dated this 19th day of March, A. D. 1894.

The condition of the above obligation is such that whereas the said Edward S. Dreyer was, on the 13th day of March, A. D. 1894, duly appointed to the position of treasurer of the West park commissioners for the term ending March 1st, 1895, and for such further term as he may continue to hold said office and until his successors are qualified:

Now, therefore, the condition of this obligation is such that if the said Edward S. Dreyer, his executors or administrators, shall from time to time and at all times hereafter duly and faithfully account for, apply, pay, transfer, and deliver up all and every the sum or sums of money, books of account, documents, and
142 other papers and things which shall come into his possession, the said Edward S. Dreyer, for or with which he shall be chargeable or accountable by virtue of his office of treasurer of said West park commissioners or in consequence of his appointment to such office according to the true intent — meaning of the statutes, regulations, ordinances, or orders of said West Chicago park commissioners which may now or hereafter be in force in relation thereto, then this obligation to be void; otherwise to remain in full force and effect.

EDWARD S. DREYER. [SEAL.]
GEORGE SCHNEIDER. [SEAL.]
GEORGE A. WEISS. [SEAL.]"

(The following certificate and affidavits appear on the back of said document:)

"State of Illinois, } ss:
County of Cook, }

I, A. D. Langworthy, a notary public in and for said county, in the State aforesaid, do hereby certify that Edward S. Dreyer, as principal, and George Schneider and George A. Weiss, as sureties, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered said instrument as their free and voluntary act for the uses
143 and purpose therein set forth.

A. D. LANGWORTHY,
Notary Public."

"State of Illinois, } ss:
County of Cook, }

I, George Schneider, do solemnly swear that I am worth, over and above my just liabilities, the sum of three hundred thousand (300,000) dollars, and that I am the owner in fee-simple of the following-described real estate located in Cook county, Illinois.

GEORGE SCHNEIDER.

Subscribed and sworn to before me this 23rd day of March, A. D. 1894.

A. D. LANGWORTHY,
Notary Public."

"State of Illinois, } ss:
County of Cook, }

I, George A. Weiss, do solemnly swear that I am worth, over and above my just liabilities, the sum of three hundred thousand (300,000) dollars, and that I am the owner in fee-simple of the following-described real estate located in Cook county, Illinois.

GEORGE A. WEISS.

Subscribed and sworn to before me this 23rd day of March, A. D. 1894.

A. D. LANGWORTHY,
Notary Public."

144 (Also on the back of the instrument appears the following endorsement:)

"Bond. Edward S. Dreyer to West Chicago park commissioners. Amount, $500,000.00. Expires ——, —. Condition, treasurer's official bond. Correct: Edward T. Noonan, attorney. Approved: Carl Moll, A. J. Graham, finance committee."

State Exhibit "K."

"Know all men by these presents that we, Edward S. Dreyer, as principal, and George A. Weiss and George Schneider, as sureties, of the city of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto West Chicago Park Commissioners of

Chicago, in the county of Cook, State aforesaid, in the sum of five hundred thousand ($500,000) dollars, good and lawful money of the United States; for the payment of which sum, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

"Witness our hands and seals this twenty-first day of January, A. D. 1895.

145 "The condition of this obligation is such that whereas the above-bounden Edward S. Dreyer was, on the eighth day of January, A. D. 1895, duly elected to the office of treasurer of the West Chicago park commissioners for the year ending January eighth (8th), 1896, and is about to assume the duties of said office: Now, if the said Edward S. Dreyer shall well and truly perform the duties of the said office of treasurer during his term of office, and shall safely keep and truly account for all moneys, goods and chattels, and other things coming to his hands as such treasurer during his term of office, and at the expiration of his term of office shall pay over to his successor in office, or to any other person duly authorized by said West Chicago park commissioners to receive the same, all moneys, goods and chattels, and other things received by him as such treasurer and not otherwise lawfully paid out, and shall deliver to his successor in office, or other person appointed to receive the same, all property, books, papers, and other things in his hands belonging to said office, and shall, at the expiration of his term of office, or oftener if thereunto requested by the said West Chicago park commissioners, render a just account of his doings as such treasurer, then this obligation to be void; otherwise to remain

146 in full force, effect, and virtue.

EDWARD S. DREYER. [SEAL.]
GEORGE A. WEISS. [SEAL.]
GEORGE SCHNEIDER. [SEAL.]

"Approved this first day of February, A. D. 1895.
HARVEY T. WEEKS,
CARL MOLL,
CHARLES J. VOPICKA,
Finance Committee."

(On the back of said document appears the following endorsement:)

"Bond. Treasurer of society. Edward S. Dreyer, treasurer of West Chicago park commissioners. George A. Weiss, George Schneider, sureties. Approved and filed this first day of February, A. D. 1895. George F. Talty, secretary. Correct: Edward T. Noonan, att'y."

147 STATE EXHIBIT "L."

"Know all men by these presents that we, Edward S. Dreyer, as principal, and George Schneider, Hempstead Washburne, and Philip Henrici, as sureties, of the city of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto West Chicago Park Commissioners of Chicago, county of Cook, State aforesaid, in

the sum of five hundred thousand ($500,000) dollars, good and lawful money of the United States; for the payment of which sum, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

"Witness our hands and seals this fourteenth day of January, A. D. 1896.

"The condition of this obligation is such that whereas the above-bounden Edward S. Dreyer was, on the thirtieth day of December, A. D. 1895, duly elected to the office of treasurer of the West Chicago park commissioners for the year ending December thirtieth (30th), 1896, and until his successor shall have been duly elected and qualified, and is about to assume the duties of said office: Now, if the said Edward S. Dreyer shall well and truly perform the duties of said office of treasurer during his term of office, and shall safely keep and truly account for all moneys, goods and chattels, and other things coming to his
148 hands as such treasurer during his term of office, and at the expiration of his term of office shall pay over to his successor in office, or to any other person duly authorized by said West Chicago park commissioners to receive the same, all moneys, goods and chattels, and other things received by him as such treasurer and not otherwise lawfully paid out, and shall deliver to his successor in office and other person appointed to receive the same all property, books, papers, and other things in his hands belonging to said office, and shall at the expiration of his term of office, or oftener if thereunto requested by the said West Chicago park commissioners, render a just and true account of his doings as such treasurer, then this obligation to be void; otherwise to remain in full force, effect, and virtue.

EDWARD S. DREYER. [SEAL.]
GEORGE SCHNEIDER. [SEAL.]
HEMP'D WAS-BURNE. [SEAL.]
PHILIP HENRICI. [SEAL.]

"Approved this sixth day of February, A. D. 1896.

M. F. TULEY,
Judge Cir. Ct., Cook C'ty, Ills."

149 (The following endorsement appears on the back of said document:)

"Bond. Treasurer of society. Edward S. Dreyer, treasurer of West Chicago park commissioners. Correct: Edward T. Noonan, att'y. Filed Feb. 17, 1896. Frank J. Gaulter, clerk. Carl Moll. Approved: Harvey T. Weeks, Carl Moll, Charles J. Vopicka, finance committee."

Q. (Paper shown witness.) Now, look at this bond and state whose signature that is. Whose is the first signature?

A. Fred M. Blount.

Q. Do you know his signature?

A. Yes, sir.

Q. You know his signature?
A. Yes, sir.
Q. That is his signature, is it?
A. Yes, sir.
Q. Is that the bond that was filed there as his bond?
A. Yes, sir.

Mr. BARNES: Filed December 21st and referred to in the minutes of the meeting—December 21st?

Mr. MORAN: When was this filed?
A. December 21st, 1896.
150 The COURT: Let me see that bond—the last one.
Mr. MORAN: I want to ask him, your honor——

Q. Is there any file-mark on it?

Mr. MORAN: I want to show that there is not.

A. No, sir.

Mr. MORAN: No file-mark on it. His honor wants to see it.
(The witness thereupon passed the bond last referred to to the court.)
Mr. BARNES: Is that the bond, Mr. Kennedy, that is referred to in the minutes of December 21st, 1896?
Mr. MORAN: Well, I object. The minutes must show and the paper must show, and not the witness.
Mr. BARNES: Of course it refers there—in those minutes, you remember, Judge, that Fred M. Blount had presented and filed his bond, signed by John R. Walsh.
The COURT: If he can tell that that was the bond presented at that meeting concerning which those records are.
Mr. MORAN: Well, if he knows—if he saw the bond presented.
The COURT: Do you know that that is the bond?
Mr. MORAN: Did you see it presented there?
A. No, sir.

Mr. BARNES:

Q. That is, you did not? Is that what you mean by "No, sir"?

Mr. MORAN: He did not see it presented.

The WITNESS: I did not see it presented.
151 Mr. MORAN: You did not see it presented there?
A. No, sir.

Mr. BARNES:

Q. Well, has there been any other bond in your keeping or the custody of the West Chicago board of park commissioners than this bond given by Fred M. Blount?
A. No, sir.
Mr. MORAN: Wait a moment. Is he the custodian of bonds?
Mr. BARNES: Yes, sir; stated so.

The COURT:

Q. Are you the custodian of the bond?
A. In the absence of the secretary, I am.
Q. You are assistant secretary?
A. Yes, sir.

Mr. BARNES:

Q. Well, do you know where the bonds are kept?
A. Yes, sir.
Q. Are there any other bonds there in the office——
A. No, sir.
Q. —or in the hands of the secretary?
A. No, sir.

Mr. BARNES: And now I offer this bond.

Mr. MORAN: No other bond of Blount's, you mean, there?
A. No other than Blount's.
Q. This is the only one?
A. The only one, sir.

Mr. BARNES: Now, I will offer this in evidence and ask to substitute a copy the same as with the others.

Mr. MORAN: There is no objection to substituting a copy, but we object to the bond.

Mr. BARNES: Well, that bond is admitted in evidence?

152 The COURT: Yes.

Mr. BARNES: And it is marked Exhibit M.

To said ruling of the court in overruling his objection to the admission of the bond of Fred M. Blount the defendant, by his counsel, then and there excepted.

Said document is in words and figures as follows:

"Know all men by these presents that we, Fred M. Blount, as principal, and John R. Walsh, Maurice Rosenfeld, and John M. Smith, as sureties, of the city of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto West Chicago Park Commissioners, a municipal corporation of the town of West Chicago, of the city of Chicago, in the county of ——, State aforesaid, in the sum of five hundred thousand ($500,000) —; for the payment of which sum, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

"Witness our hands and seals this 21st day of December, A. D. 1896.

"The condition of this obligation is such that whereas the above-bounden Fred M. Blount was, on the 21st day of December, A. D. 1896, duly elected to the office of treasurer of the West Chicago park commissioners for the unexpired term of Edward S. Dreyer,

153 removed, and is about to assume the duties of said office: Now, if the said Fred M. Blount shall well and truly perform the duties of said office of treasurer during his term of office and shall safely keep and truly account for all moneys, goods and chattels,

and other things coming to his hands as such treasurer during his term of office, and at the expiration of his term of office shall pay over to his successor in office, or to any other person duly authorized by said West Chicago park commissioners to receive the same, all moneys, goods and chattels, and other things received by him as such treasurer and not otherwise lawfully paid out, and shall deliver to his successor in office or other person appointed to receive the same all property, books, papers, and other things in his hands belonging to said office, and shall at the expiration of his term of office, or oftener if thereunto requested by the said West Chicago park commissioners, render a just and true account of his doings as such treasurer, then this obligation to be void; otherwise to remain in full force, effect, and virtue.

FRED M. BLOUNT. [SEAL.]
JOHN R. WALSH. [SEAL.]
MAURICE ROSENFELD. [SEAL.]
JOHN M. SMYTH. [SEAL.]

"Approved this 21st day of December, A. D. 1889.

"R. S. TUTHILL,
Judge of Circuit Court.

154 Mr. BARNES: It is agreed that a copy may be substituted in the place of it.

I would like to withdraw the witness for a moment. There is another witness here that has got to leave town tomorrow.

Mr. MORAN: You will bring him back again?

Mr. BARNES: Yes.

Mr. MORAN: That is all right.

(Thereupon the witness was withdrawn from the stand temporarily.)

A. D. LANGWORTHY, called as a witness on behalf of the State having been first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. What is your name, please?
A. A. D. Langworthy.
Q. Do you know the defendant, Edward S. Dreyer?
A. Yes, sir.
Q. Were you ever in his employ?
A. Yes, sir.
Q. When?
A. For several years, ending in 1896—before December, 1896.
Q. What time did your service with him close—before December?
A. At the time of the failure of the firm.
155 Q. Then you mean the firm of Edward S. Dreyer & Company, bankers?
A. Yes, sir.
Q. Then you were in their employ up to the time that they ceased to do business?
A. Yes, sir.

Q. Do you remember the date of that?
A. About December 20th, 1896.
Q. Now, what was your business in connection with the firm, Mr. Langworthy?
A. I was in the real-estate-loan department.
Q. Do you know Mr. Dreyer's signature?
A. Yes, sir.
Q. Seen him write?
A. Yes, sir.
Q. (Paper shown witness.) Do you know whether that is Mr. Dreyer's signature on the back of that check?
A. Yes, sir; his signature is there.
Q. Is that his signature (indicating)?
A. This one (indicating)?
Q. Yes; "E. S. Dreyer."
A. Yes, sir.
Q. Do you know Mr. Berger's signature?
A. Yes, sir.
Q. Whose signature is that (indicating)? There is the stamp there, "E. S. Dreyer," and it is signed "A. Berger" under it.
A. That is Mr. A. Berger's signature.
Q. That is Adolph Berger?
A. Yes; Adolph Berger.
Q. That is not the partner; that is the brother of the partner?
A. The brother—the teller of the bank.
156 Q. (Paper handed to witness.) I hand you some other checks here, which are just stamped "E. S. Dreyer, treasurer," with the initials "A. B." in writing. Do you know whose initials those initials A. B. are?
A. Those are Adolph Berger's.
157 Q. Now, here are two checks, E. S. Dreyer, treasurer, written on them; whose signature is that?
A. Mr. Robert Berger's.
Q. Robert Berger's?
A. Yes, sir.
Q. That is the partner of Mr. Dreyer's?
A. Yes, sir.
Q. And here is another one also (showing witness paper).
A. Robert Berger also.

Mr. BARNES: The five checks on which the witness identifies the initials A. B. as the writing of Adolph Berger are marked State's Exhibits 6, 8, 12, 14, and 23. The 3 checks which are endorsed E. S. Dreyer, treasurer, in the handwriting of Robert Berger are marked State's Exhibits 7, 22, and 24.

It is conceded that on the back of the following checks marked as follows, State's Exhibits 1, 2, 3, 4, 10, 11, 15, 16, 17, 18, 19, 20, 21, 25, and 13, are all endorsed E. S. Dreyer, treasurer, in the handwriting of E. S. Dreyer, the defendant.

Q. Now, Mr. Langworthy, the checks which I show you are checks

purporting to be checks of D. H. Kochsberger, county treasurer. Did you ever go to the county treasurer's office for Mr. Dreyer?

A. Yes, sir.

Q. Did you ever receive any of those checks?

A. I couldn't say that I did.

Q. Did you ever receive any checks from the county treasurer?

158 A. Yes, sir.

Q. Like those in form payable to the order of E. S. Dreyer, treasurer?

A. Yes, sir.

Q. Did you take those checks endorsed whenever you took checks—whenever you received those checks did you ever deliver anything in return for them?

A. When I received them from the county treasurer?

Q. Yes. Did you give the county treasurer anything for them?

A. I always gave him an order from the park board, as I understand it.

Q. I will show you an order here, 379, purporting to be from Harvey T. Weeks, president of the West park board, and George F. Talty, treasurer, addressed to E. S. Dreyer, treasurer West Chicago park commissioners. Did you ever take any checks, or I would say any warrants, of that bond to the county treasurer to receive payment (handing witness paper)?

Judge MORAN: I think if he took that it is all right.

Mr. BARNES: Did you take that?

A. I couldn't say that I did.

Q. Did you take any like it—I mean in form?

Judge MORAN: I object to that. In form means the words on the order.

The COURT: In form, excluding the amounts and dates; otherwise in form like that. I think he may answer that.

159 To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES: Did you?

A. I don't understand that question.

Mr. BARNES: Did you ever take any papers purporting to be warrants drawn on Edward S. Dreyer, treasurer of the West Chicago board of commissioners, and purporting to be signed by officers of the park board?

Judge MORAN: I object. Any orders he took they have them undoubtedly, and can present them.

Mr. BARNES: It is utterly impossible for this witness to identify and say among various orders taken to the county treasurer that he took that very order; but the purpose—I am calling this witness a little out of order. I shall show subsequently that these very orders here—these very checks—were handed out by the county treasurer's office to persons purporting to present them for Mr. Dreyer, and it would be not within the range of possibility for any living man to say that he received—took a particular warrant to the county treas-

urer; but I think it is competent for him to show that he did take warrants there and received checks for them, and to state whether those warrants when they were taken there were endorsed, because we shall show that these warrants are endorsed, and show by this witness, too, that there are many of them endorsed by E. S. Dryer. I think I have the right to show generally that the warrants he took for Mr. Dreyer were endorsed by Mr. Dreyer before he
160 took them there.

The COURT: I think he has the right to show that he took, at the instance of Mr. Dreyer, paper to the county treasurer and what he obtained there—whether Mr. Dreyer's endorsement was on it. You may show that.

Judge MORAN: In the absence of the paper? The paper is the best evidence.

The COURT: I presume the paper is the best evidence.

Judge MORAN: They have it, your honor. It is to be found in Dreyer's papers and the county treasurer's papers, just as these are.

The COURT: I think he may show that he took papers there at the instance of Mr. Dreyer, and then he may show what he received thereon, and then he may show whether Mr. Dreyer's signature was on the papers which he took there.

Judge MORAN: The paper is the best evidence of a signature upon it. A man may take papers as a mere messenger, and, of course, that is entirely competent, but when you come to show the contents of the papers, if the paper is gone, that may be done by secondary evidence. If this paper is in the possession of the party, of course that is the best proof.

The COURT: He is asked whether he took papers there. The paper, if here, wouldn't show in and of itself that it was Mr. Dreyer's signature.

161 Judge MORAN: If Dreyer's signature was on it?

The COURT: It would show that Dreyer's name was on the paper, but it wouldn't show that that was Dreyer's signature; that has to be proved outside of the paper.

Judge MORAN: The question that was asked is whether Dreyer's signature was on the paper; that is what I am objecting to.

The COURT: You or I or any member of the jury wouldn't know whether it was Dreyer's signature or not. It is only a man familiar with his signature and saw what purported to be his signature who could tell whether it was his signature or not. This man testified he was familiar with Dreyer's signature. The fact that his name was on the paper is of no consequence, so far as I can see, in this case unless it was Mr. Dreyer's signature. The paper won't show that if it were here. The man testifies, according to his present statement, that he knows whether—if there was anything on there that purported to be Dreyer's signature, whether it was or not.

Judge MORAN: He is speaking of an absent paper.

The COURT: Quite true, he is speaking of an absent paper.

Judge MORAN: The paper is a document. A paper and everything upon it, whether it is a name or figure or anything else, is

what there is upon it—it is what is on it. The paper is the
162 best evidence of what is on it. If a paper is shown to be lost and out of the possession of the party that is offering it, of course he can by secondary evidence describe it and show what is on it. In this case there is no pretense that the paper is not in their power, but they undertake to describe the paper in its absence. They might as well describe it as to date and amount and everything else. We have a right to the best evidence.

The COURT: That is quite true. They are calling this witness out of order.

Judge MORAN: I have no objection to his stating that he carried papers and took back papers, but I have objection to his stating what names were on the papers or anything about them unless it is shown they are not in their control. I have no doubt he took papers. It is to the kind of evidence that I am objecting. We are entitled to the best evidence of everything.

Mr. BARNES: Let that go for a moment and we will see if we cannot get along a little faster by taking another cut.

Q. Who sent you over to the county treasurer's office to get the checks that you did get?

A. Mr. Robert Berger usually.

Q. Where did you get the paper you took over there?

A. Usually from Mr. Berger, Mr. Robert Breger.

Q. Did you ever get any papers from Mr. Dreyer?

A. I don't remember that I ever did.

Q. What did you do with the checks which you got over
163 there at the county treasurer's office?

Judge MORAN: You mean the paper?

Mr. BARNES: He said he got some checks like this (indicating).

Q. What did you do with them?

Judge MORAN: I did not understand him to say that.

The COURT: What did you do with whatever you obtained at the county treasurer's office?

A. I returned them to Mr. Robert Berger usually.

Mr. BARNES: Do you know what he did with them?

Judge MORAN: Of your own knowledge.

A. Not always; no, sir.

Mr. BARNES: Did you take a paper over there when you went over to get the check or whatever it was that you brought back?

A. Yes, sir.

Q. Was such paper endorsed before it was taken over there?

A. I think it always was; yes, sir.

Q. Look at this paper which I now show you and state whose endorsement is on the back thereof.

A. Mr. E. S. Dreyer.

Q. The defendant?

A. Yes, sir.

Mr. BARNES: I will identify these, inasmuch as they are all numbered, because I will introduce them later in evidence. As a matter

of convenience I will identify them as I go along by numbers and dates.

Judge MORAN: Very good.

164 Mr. BARNES: Referring to draft number 378 of West Chicago park commissioners, dated May 11th, 1895, what is the next number?

Mr. DENEEN: June 22nd, 1895.

Mr. BARNES: Look at draft number 379, office of the West Chicago park commissioners, dated July 21st, 1895, and state in whose handwriting the endorsement, E. S. Dreyer, treasurer, is on the back of that.

A. His own.

Q. Look at the two, 380 and 381, two drafts dated July 17th, 1895.

Judge MORAN: If we were to see these we would admit the signature on them, just like the other checks.

Mr. BARNES: These are glued down. I don't know whether you would admit those or not.

Q. I wish you would look there and see if you can tell in whose handwriting the endorsement is on the back of those two.

A. Those are both Mr. Robert Berger's handwriting—E. S. Dreyer's name.

Q. When you speak of Robert Berger—there is only one Robert Berger—you speak of the partner of the defendant, E. S. Dreyer?

A. Dreyer's former partner.

Q. Look at 382 and tell whose endorsement is on the back of that, it being understood that all of these numbers which I give

165 purport to be warrants of the West Chicago park commissioners, so that I won't have to repeat it each time and won't have to identify them by numbers.

A. That is E. S. Dreyer's signature, written by Robert Berger.

Judge MORAN: E. S. Dreyer's name written by Robert Berger?

A. His name; yes, sir.

Mr. BARNES: Look at 383, 384, and 385, being under date of September 3rd, 1895, and see if you can tell whose signatures those are.

A. 383 is E. S. Dreyer's name, written by Robert Berger; 384 is E. S. Dreyer's name, written by Robert Berger; 385 is E. S. Dreyer's name, written by Robert Berger.

Q. 386, dated September 16th, 1895.

A. Written by myself—E. S. Dreyer's name written by myself.

Q. Did you have authority to write his name?

A. They accepted it.

Q. What is that?

A. They accepted it.

Q. They accepted it?

A. Yes, sir.

Q. And you endorsed it and returned the check? Did you get a check for this when you endorsed it?

A. I got a check for it; yes, sir.

Q. A check for the same amount as the draft calls for?

A. The same amount.
Q. What did you do with the check?
A. I returned it to the bank—either to Robert Berger or
166 Adolph Berger; I couldn't say which.
Q. Adolph Berger is the cashier?
A. He is the teller.
The COURT: What bank do you mean? The bank of E. S. Dreyer & Company?
A. Yes, sir.
Mr. BARNES: What position did Robert Berger hold?
A. He was a partner.
Q. In the banking business?
A. Yes, sir.
Q. 387. Whose signature is that?
A. That is my own, E. S. Dreyer's name written by myself.
Q. And did you receive a check for that in the same way you did the other?
A. Yes, sir.
Q. And delivered it to the bank of E. S. Dreyer & Co. for deposit?
A. I wouldn't be positive about to whom I delivered that. I delivered some checks to the National Bank of Illinois, but it was one of those three.
Q. But did you take the pass book when you delivered it to the National Bank of Illinois?
A. I don't remember; I think I did; I wouldn't be positive to that.
Q. You took it there to deposit in Dreyer's account, did you?
A. Yes, sir.
Judge MORAN: Let him tell what he did with it.
Mr. BARNES: 388, October 31st, 1895, E. S. Dreyer, treasurer. See if you can tell whose endorsement that is.
A. It is my own endorsement, E. S. Dreyer's name written
167 by myself.
Q. And you received a check for that in the same manner that you did for the others?
A. Yes, sir.
Q. You returned it as you did the others?
A. Yes, sir.
Q. 389, also glued down.
A. It is my own writing, Mr. Dreyer's name.
Q. And you took the check and returned it the same as the others, did you, for them?
A. Yes, sir.
Q. In order to save questioning wherever you signed, endorsed any of those warrants, and received a check for the same, what did you do with the check?
A. Returned it to the bank of E. S. Dreyer & Co. usually, as I stated before.
Q. Sometimes the National Bank of Illinois?
A. Yes, sir.

Q. For deposit there to their account?
A. Yes, sir.
Q. 390, November 18. Whose endorsement is that?
A. Mr. Dreyer's writing, E. S., of his own name.
Q. Look at 391 and 392. They are also the same date as 390. Whose signatures are those?
A. Those are both Mr. Dreyer's own signature.
Q. Look at 393, 394, and 395, under date of December 4th,
168 1895. They are glued down, and tell me whose signatures those are.
A. 395 is my own writing of Mr. Dreyer's name; 393 and 394 also.
Q. 396 and 397, dated December 13th, and then follows 398, 399, 400, and 401, all on the next page, all glued down, all December 13th, and see by whom they are endorsed—whose handwriting?
A. 396 and 397 are Mr. Dreyer's own signature; 398 and 399, 400, and 401 are also Mr. Dreyer's own signature.
Q. Look at 402, May 4th. Whose signature is that?
A. It is Mr. Dreyer's name, written by Robert Berger.
Q. 403, June 2nd, 1896, E. S. Dreyer. Whose signature is on the back of that?
A. Mr. Dreyer's name, by Robert Berger.
Q. 404 and 405, July 14th, 1896, also pasted down.
A. 404 and 405 are both Mr. Dreyer's own signature.
Q. 406, August 4th, 1896. Whose signature is that?
A. Mr. Dreyer's name, by Robert Berger.
Q. 407 and 408, August 11th, 1896, are by whom?
A. Both by Mr. Dreyer, personally.
Q. 409, August 27th. Whose writing is that endorsement?
A. E. S. Dreyer, by Robert Berger.
Q. 410, September 8th.
A. E. S. Dreyer, personally.
Q. 411, September 8th.
A. E. S. Dreyer, personally.
Q. 412, September 23rd.
A. E. S. Dreyer, personally.
Q. 413, same date.
A. E. S. Dreyer, personally.
Q. 415, October 3rd, 1896.
169 A. 415 is Edward S. Dreyer, by Robert Berger.
Q. 414, October 3rd, 1896.
A. It is Mr. Dreyer's name, by Robert Berger.
Q. 416 and 417 of date October 13th, '96, both pasted down.
A. Both Mr. Dreyer's personal signature.
Q. Look at 14, 18, 19, 20, 21, and 22, all pasted down and under date of October 30th, 1896.
A. They are all Mr. Dreyer's personal signature.
Q. 423. Whose signature is that?
A. E. S. Dreyer, written by Robert Berger.
Q. Look at 424, December 17th.
A. E. S. Dreyer's personal signature.

Q. 425, same date.
A. E. S. Dreyer's personal signature.
Q. 427, same date.
A. E. S. Dreyer's personal signature.
Q. 426.
A. The same.

Cross-examination by Judge MORAN:

Q. Mr. Langworthy, when you got checks at the county treasurer's, you say you sometimes took them direct to the National Bank of Illinois?
A. I did in at least one or two instances.
Q. In other cases you took them back to Dreyer's banking office?
A. Yes, sir.
170 Q. Were you ever sent with them after that from Dreyer's office to the National Bank of Illinois?
A. Yes, sir; I have been.
Q. Very frequently?
A. Quite often. I wouldn't say how often.
Q. Quite often?
A. Yes, sir.
Q. Delivered them to the National Bank of Illinois?
A. Yes, sir.
Q. Deposited them there?
A. Yes, sir.
Q. These checks that are shown you on which you find Mr. Dreyer's signature on the back and some Mr. Berger's you see stamped there (indicating)?
A. Yes, sir.
Q. Do you know what that signifies?

Mr. BARNES: We will admit it. There won't be any doubt about it.

Judge MORAN: It means paid to the National Bank of Illinois.

Mr. BARNES: Where they are stamped. We will have some bankers here and will establish that or admit it as the fact may be.

Judge MORAN: We need not go through all of them.

Mr. BARNES: No; we can make an agreements as to that.

Judge MORAN: You admit that now on all these bonds?

Mr. BARNES: Yes.

171 Judge MORAN: The jury may not know the significance. It seems that they were paid to the National Bank of Illinois.

Mr. BARNES: Through it.

Judge MORAN: Paid to it; that they got the money.

Mr. BARNES: That they collected it through the clearing-house and put it to the account of Mr. E. S. Dreyer, in their bank.

Judge MORAN: That it was given to the National Bank of Illinois and they collected the money. What they did with that money afterwards we will see.

Mr. BARNES: It went through the clearing-house, certainly.

Adjourned until Thursday, February 22nd, 1900, at 10 o'clock a. m.

172 THURSDAY, *February 22nd*, 1900—10 a. m.

Court met pursuant to adjournment; whereupon the hearing of the case was resumed as follows:

Mr. BARNES: I offer in evidence as "State's Exhibits X and Y" certified copies of the abstract of the vote cast in adopting the act establishing the West Chicago park board of commissioners.

Judge MORAN: The only objection is that they are unnecessary because it is a public statute.

Mr. BARNES: That may be so, but it is a little peculiar in this: the first act could not become a public statute until it was adoopted by a vote. The second or amended act never was adopted by a vote and never was a public statute, and yet the Supreme Court has held in an amendment to that act that you could amend it without submitting it to a vote, and to save any point, as it does the defendant no injury, I will introduce it.

The papers offered in evidence are in words and figures as follows, to wit:

"STATE'S EXHIBIT X."

Abstract of Votes.

Given in the town of West Chicago and that part of the towns of Cicero and Jefferson which were entitled to vote at an election held in said town and part of towns in the county of Cook and
173 State of Illinois, on Tuesday, the 23rd day of March, A. D. 1889.

For parks and boulevard's received forty-four hundred and twenty-two votes (4,422).

Against parks and boulevard- received thirty-nine hundred and three votes (3,903).

Against parks received fourteen (14) votes.

In the aforesaid part of the town of Jefferson.

For city extension received twelve (12) votes.

Against city extension received twenty-two (22) votes.

We, the undersigned, justices of the peace of the county above named, were this day taken to the assistance of the clerk of the county court of said county, and the poll books for the aforesaid election were opened and the foregoing abstract made in our presence, at the clerk's office, at Chicago, in said county, this twenty sixth day of March, A. D. 1869.

JAMES B. BRADWELL,
Justice of the Peace.
J. SUMMERFIELD,
Justice of the Peace.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Edward S. Salomon, clerk of the county court for the county and State aforesaid, do hereby certify that the foregoing is a correct

statement of the votes cast for and against parks and boulevards—also for and against city extension—at an election held in the
174 above-mentioned town and part of towns in the county of Cook and State of Illinois on Tuesday, the 23rd day of March, A. D. 1869.

In witness whereof I have hereto set my hand and affixed the seal of said court this twenty-sixth day of March, A. D. 1869.

[SEAL.] EDW. S. SALOMON,
Clerk of the County Court.

UNITED STATES OF AMERICA, }
State of Illinois, } ss:

OFFICE OF THE SECRETARY OF STATE.

I, James A. Rose, secretary of state of the State of Illinois, do hereby certify that the foregoing is a true copy of the abstract of votes given in the town of West Chicago and part of the towns of Cicero and Jefferson, in the county of Cook and State of Illinois, at an election held March 23, 1869, the original of which is now on file in my office.

In witness whereof I hereto set my hand and affix the great seal of State, at the city of Springfield, this 26th day of May, A. D. 1898.

[Seal of the State of Illinois, August 26th, 1818.]

JAMES A. ROSE,
Secretary of State.

175 "STATE'S EXHIBIT Y."

STATE OF ILLINOIS, }
County of Cook, } ss:

I, Edward S. Salomon, clerk of the county court for the county and State aforesaid, do hereby certify that pursuant to an act of the General Assembly of the State of Illinois entitled "An act to amend the charter of the city of Chicago, to create a board of park commissioners, and authorize a tax in the town of West Chicago, and for other purposes," approved February 27th, 1869—

I designated the places of holding the elections in said act provided for and gave notice thereof in the Chicago Tribune, Chicago Post, Chicago Republican, Chicago Journal, Illinois Staats Zeitung, Chicago Union, and Chicago Times, the same being daily newspapers published in the county of Cook, which said notices were given at least ten days preceding the day of election; and I hereby further certify that said election was held on the fourth Tuesday of March, A. D. 1869, as provided by said act, in the town of West Chicago and that part of the towns of Cicero and Jefferson which were entitled to vote at said election, and that the judges of said election in the several precincts in the town and part of towns aforesaid returned to me the poll books and ballots of said election, and that subse-
176 quently, to wit, on the 26th day of March, A. D. 1869, and after all the returns had been received from the several pre-

cincts aforesaid, I called to my assistance James B. Bradwell, judge of the county court *of ex officio* justice of the peace and John Summerfield, justice of the peace, both of Cook county, and on that day, together with said justices of the peace, proceeded to canvas- the votes so returned, and I hereby further certify that the said election resulted as follows, to wit:

The whole number of votes cast on the subject of "parks and boulevards" in said town and part of towns was eight thousand three hundred and twenty-five, of which there were "for parks and boulevard" four thousand four hundred and twenty-two, and of which there were "against parks and boulevard" three thousand nine hundred and three, and "against park" were cast fourteen votes.

In the aforesaid part of the town of Jefferson the whole number of votes cast on the subject of "city extension" was thirty-four, of which there were "for city extension" twelve, and of which there were "against city extension" twenty-two.

In witness whereof I have hereto set my hand and affixed the seal of said county clerk, at my office, in the city of Chicago, this 26th day of March, A. D. 1869.

EDW. S. SALOMON,
Clerk of the County Court.

177 UNITED STATES OF AMERICA, }
State of Illinois, } *ss:*

OFFICE OF THE SECRETARY OF STATE.

I, James A. Rose, secretary of state of the State of Illinois, do hereby certify that the foregoing is a true copy of the abstract of votes given in the town of West Chicago and part of the towns of Cicero and Jefferson, in the county of Cook and State of Illinois, at an election held March 23rd, 1869, the original of which is now on file in my office.

In witness whereof I hereto set my hand and affix the great seal of State, at the city of Springfield, this 26th day of May, A. D. 1898.

[Seal of the State of Illinois, August 26th, 1818.]

JAMES A. ROSE,
Secretary of State.

178 THOMAS P. KENNEDY was then recalled upon behalf of the People and testified as follows:

Direct examination by Mr. BARNES:

Q. Mr. Kennedy, have you, in your position as assistant secretary of the West park board of commissioners, become familiar with their method of doing business as to checking out their accounts?

A. Yes, sir.

Q. Did you know of an account kept in the bank of Edward S. Dreyer in the name of West Chicago park commissioners?

A. Well, I never saw their books.

Q. Well, did you know of an account being kept there?

A. I knew there was an account there; yes, sir.

Q. Did the West Chicago park board of commissioners keep any other account than the account that was kept there—bank account?

A. No, sir.

Q. Did the West Chicago park commissioners or any of its officers draw any checks on that account?

A. They did on that account; yes, sir.

Q. They drew checks on that account. Did they check on that account?

A. The officers?

Q. What?

A. The officers of the park?

Q. Yes, sir.

A. Why, checks drawn, signed by the secretary and auditor and countersigned by the treasurer.

Q. Well, how were they drawn?

A. On the treasurer.

179 Q. Edward S. Dreyer, treasurer?

A. Yes, sir.

Q. Now, were any drawn on the bank?

A. No, sir.

Q. How were the accounts—the moneys—of the West park board disbursed? What was the method of procedure?

A. Well, on checks drawn on the treasurer. Bonds were payable at his office, interest coupons and so forth.

Q. What was the source of income of the West Chicago park commissioners?

A. It was principally from taxes and from bonds issues.

Q. What was done with the moneys received from those sources? In other words, how did you obtain the moneys from the taxes?

A. The money was obtained on a draft on the county treasurer payable to the treasurer of the West park board.

Q. Well, before that was done what steps were taken by the board in the first instance to obtain the taxes that belonged to the board from the county treasurer?

A. Whenever they found out that the county treasurer had any taxes for them, any money for them, why they would make a draft on the county treasurer.

Q. Now, I show you a draft number 423, office of the West Chicago park commissioners, dated November 20, '96, purporting to be signed by Harvey T. Weeks, president West Chicago board of park commissioners, and George F. Talty, secretary (handing witness paper). Do you know the signature of Weeks?

A. Yes, sir.

180 Q. And Talty?

A. Yes, sir.

Q. Are those their signatures?

A. Yes, sir.

Q. Is that the form of draft used in drawing the taxes from the county treasurer?

A. Yes, sir.
Q. Was any other form of draft used?
A. No, sir.
Q. Did the West park board itself or any of its officers handle those funds after they drew that draft?
Judge MORAN: If you know.
Mr. BARNES: You know their regular course of business, do you?
A. Yes, sir.
Q. Now, did the West Chicago park commissioners or any of its officers handle those funds after they drew that draft on the county treasurer?
A. The treasurer of the park board was the only officer.
Q. Was the only officer?
A. Yes, sir.
Q. Now, when the park wanted to pay out any moneys, how did it do it—the park board?
A. There was a warrant drawn on the treasurer for the amount.
Q. When the warrant was paid was there any voucher accompanying it?
A. Yes, sir.
Q. What was the method of doing business?
A. There was a voucher made out first and approved by the finance committee and the auditor authorizing a check to be drawn or a warrant to be drawn on the treasurer.
Q. Then the warrant was drawn?
A. Yes, sir.
Q. Did that warrant ever return to your hands, or the voucher?
A. Yes, sir.

181 Judge MORAN: Well, the voucher didn't leave his hands.
Mr. BARNES: Well, I didn't know, but it was signed "Received payment." (To the witness:) Did the voucher leave your hands—come back receipted?
A. We kept the voucher.
Q. Well, was there any receipt came back?
A. The warrant was returned at the end of the month.
Q. At the end of the month? Who returned it?
A. It came from Mr. Dreyer.
Q. The treasurer?
A. The treasurer.
Q. Have you the vouchers, or, I would say, any of the warrants or drafts that were paid that were drawn on Edward S. Dreyer, treasurer, that were paid after November 30th, '96?
A. No, sir.
Q. Do you know where they are?
A. No, sir.
Q. Have you looked for them?
A. Yes, sir.
Q. When did you last see them?
A. In the first trial of this case.
Q. Have you made a search for them since?

A. Yes, sir.
Q. You have not been able to find them?
A. No, sir.
Q. You have searched where they are usually kept, have you?
A. Yes, sir.

Cross-examination by Judge MORAN:

Q. You say, Mr. Kennedy, that after the funds went from the county treasurer—they went from two sources, I understand
182 you to say, from the sale of bonds and from taxes collected by the county treasurer?
A. Yes, sir.
Q. You say after they were taken from the county treasurer and delivered to E. S. Dreyer & Co. that nobody handled these but Dreyer, the treasurer?
A. So far as we know, nobody else handled them.
Q. You say they were drawn on only by warrants upon Dreyer, the treasurer?
A. Yes, sir.
Q. Didn't the board draw directly upon the fund itself without drawing on Dreyer at all?
A. No, sir.
Q. Look at this that I now show you (handing witness a paper). Is that a check on the Dreyer bank for park funds?
Mr. BARNES: That shows for itself, sir.
Judge MORAN: Yes; I know it shows for itself.
A. That is a check on the paymaster's account in Dreyer's bank.
Q. A check on the paymaster's account?
A. Yes, sir.
Q. That was the money of the West park board, wasn't it?
A. Well, it was withdrawn from the hands of the treasurer and placed to the deposit of the paymaster.
Q. A special deposit to the paymaster?
A. Yes, sir.
Q. Wasn't it kept there just like anything else—kept there to the account?
A. Not to the treasurer's account.
Q. Wasn't it kept for the account of the West Chicago park in the pass books just like the rest?
A. It was kept in a special account.
183 Q. How?
A. It was kept in a special account with the paymaster.
Q. Well, was there any special account; wasn't it the general account of the West park board with E. S. Dreyer & Co. running clear through the books?
A. No, sir.
Q. Did you have any special—separate—account with Dreyer & Co. except the general account of the West park commissioners with E. S. Dreyer & Co.?
A. The paymaster kept a special account there.

Q. In his name?
A. Yes, sir.
Q. In the paymaster's name?
A. Yes, sir.
Q. Is that drawn on the paymaster's account (referring to paper)?
A. Yes, sir.
Q. On the account kept in the paymaster's name?
A. Yes, sir.
Q. And not in the name of the West park board?
A. No, sir.
Q. Now, you recognize the signature to that, do you?
A. Yes, sir.
Q. Is that signed by the then secretary?
A. Yes, sir.

Judge MORAN: I offer this in evidence in connection with the cross-examination of the witness.

Mr. BARNES: I object to your offering that when we are putting in our case. I have no objection to your offering it when it comes to your own case.

184 The COURT: He can certainly use it for the purpose of cross-examination, and offer it at the proper time. I don't see any special objection to his offering it now. Perhaps it may make the whole matter clearer.

Judge MORAN: It is cross-examination.

The COURT: The questions you have asked thus far are cross-examination, and I see no special objection to its being offered now, and it may serve to make examination clearer.

Mr. BARNES: I object to it because it is not a draft on Mr. Dreyer's bank. It is simply an order payable to one Masterson in full for services to date—$58—signed West Chicago park commissioners, by Hugh Wilkinson. It is a draft by Wilkinson on the West Chicago park commissioners. Now, it has nothing whatever to do—and when you come to find out about it you will find out it never could have been drawn out of this account excepting by the consent of E. S. Dreyer. It is not competent at any rate at this point. It is not competent now, because it is no proof of any fact which counsel seeks to draw out. There must be further evidence upon it before it is introduced.

The COURT: I will allow you to offer it now and to examine the witness upon it. I don't know as it is of any consequence, but I understand it is a draft signed by the secretary.

Judge MORAN: The consequence of it we will get at afterwards.

185 Mr. BARNES: It is not signed according to the rules.

Judge MORAN: It is payable at the bank of E. S. Dreyer.

Mr. BARNES: That may be.

The COURT: It is signed by——

Judge MORAN: By the secretary of the board.

The COURT: Not as secretary. It is signed Hugh Wilkinson, paymaster. A man may act in duplicate capacities, and his actions

in one capacity don't bind the man in any other capacity, but I say, without discussing it, you may introduce it and examine upon it, as it appears to be signed by the West Chicago park commissioners, by Hugh Wilkinson, paymaster, not as secretary, but manifestly in some other way than simply as secretary.

Mr. BARNES: All I object to at this time is this: I object to the introduction of the evidence at this time because it is evidence on their part and it should be offered, according to the practice, when——

The COURT: I understand that.

Mr. BARNES: Of course this witness may be used to identify the check. It is incompetent for this reason, because it does not show out of what account it is paid or who paid it.

The COURT: I don't think it is of any consequence. I only allow it for the purpose of making the testimony of this witness more understandable.

Judge MORAN: I don't desire any intimation one way or the other as to the consequence of the evidence. It is dangerous when it comes from the court.

186 The COURT: I simply say I don't know whether it is competent or not at present.

Judge MORAN: The purpose of offering it now is this: It is as to the method in which this fund was dealt with. It is cross-examination of the method in which this fund was dealt with, and that is the reason I offer it now. There will be a good many others. I have the others in my hand.

Mr. BARNES: I have no objection to the cross-examination of this witness as to any of these papers, but I object to their introducing their case now because it is not in the regular order of practice. Let him go and introduce the other checks in the same way. If he wants to offer it, then we can discuss its materiality.

Judge MORAN: Let us begin each one offering our own case without any bargain and taking the ruling of the court on it.

Mr. BARNES: That is what I propose to do.

Judge MORAN: That's what I propose to do, and let's have all sorts of suggestions as to how it should be done. Stop here.

Mr. BARNES: Do I understand it is admitted in evidence?

Judge MORAN: I understand the court has so ruled.

Mr. BARNES: I don't. That's the reason I don't want to stop here. I don't understand the court has received that check in evidence.

The COURT: Yes, sir; I have.

187 Mr. BARNES: It is received in evidence?

The COURT: Yes, sir.

Mr. BARNES: Very well.

(The paper was marked "Defendant's Exhibit A," and is in words and figures as follows, to wit:)

188 *Pay Check.*

No. 185. CHICAGO, *Dec.* 1, 1894. $58.50.

West Chicago park commissioners.

Name No. 172.

Pay to the order of B. Masterson, in full for services to date, fifty-eight & $\frac{50}{100}$ dollars.

Voucher No. —.

WEST CHICAGO PARK COMMISSIONERS,
By HUGH WILKINSON, *Paymaster.*

This check is payable at E. S. Dreyer & Co.'s bank, N. E. cor. Dearborn & Washington streets, Chicago, Ills.

Not good if drawn for more than $150.00.

(Endorsed:) B. Masterson, Pierce Quick.

189 Judge MORAN: What signature is on that paper shown you (handing witness another paper)?

A. George F. Talty, secretary.

Q. Do you know where that fund was?

A. Yes, sir.

Q. Where was it?

A. In the hands of the treasurer.

Q. In the hands of the treasurer?

A. Yes, sir.

Q. Is that drawn on the treasurer?

A. No, sir.

Q. How?

A. Drawn on E. S. Dreyer & Co.

Q. Drawn on E. S. Dreyer & Co. I will show that to the court. Do you want to see it, Mr. Barnes?

Mr. BARNES: Yes, sir. (The paper was submitted to Mr. Barnes.) I object to it. It is not a draft. It is not drawn on anybody. I want to object to that last paper also, because the paper always speaks for itself. The proper thing is to identify the signature, and then, if it is competent, to introduce it. I admit this is the signature of George F. Talty.

Judge MORAN: I offer this paper on the letter-head of the West park commissioners, addressed to E. S. Dreyer & Co., signed by George F. Talty, secretary, directing the payment of money.

Mr. BARNES: I object to it because it is a letter, because it is not a draft or anything of that kind. You might as well admit all the correspondence here on cross-examination. It is just about as relevant.

190 The COURT: I think this comes under a different category from the other, Judge Moran.

Judge MORAN: Who paid the money out on that?

Mr. BARNES: I object. He has not proved money was paid out on it.

Judge MORAN: Was it paid on that order?

Mr. BARNES: I object. He didn't pay it.

Judge MORAN: Do you know whether it was paid or not?

Mr. BARNES: I object.

Judge MORAN: Why, your honor, this witness was put on and asked about the course of business.

Mr. BARNES: Yes, sir.

Judge MORAN: The course of business—how it was done—and they showed how the money got in and how it got out. There is no pretense that he took out the money himself. Here is the course of business.

The COURT: You are asking the course of business. The proper question would be to ask whether that went out of the office and whether it came back in the condition in which it is now. I think it is fair to assume that this witness, if there was any money paid out on it, was not there and saw it paid out. You are asking him a question that it seems to me it is not likely he knows anything about.

Judge MORAN: He never saw the money paid out on any of these warrants by Dreyer.

The COURT: Why do you ask him that, then?

Judge MORAN: Then I will ask to have his evidence
191 stricken out as to the payment of money.

The COURT: He was asked as to the custom.

Judge MORAN: He says it was done in one way. Well, I propose to show from his cross-examination that was not the way.

The COURT: You may ask him in what way that warrant was issued and in what way it came back.

Judge MORAN:

(Q.) You have spoken of the course of business there. You say it was by drawing warrants upon Dreyer, treasurer?

A. Yes, sir.

Q. Don't you know that orders were drawn upon E. S. Dreyer & Co. for the payment of money that were not warrants on Dreyer, treasurer?

A. The——

Q. No; yes or no.

A. No, sir.

Q. I will refresh your recollection. Was that drawn for the payment of money (handing witness a paper)?

Mr. BARNES: I object. It speaks for itself.

Judge MORAN: I have a right to put it in his hand to refresh his recollection.

The COURT: You have a right to put it into his hand and ask him to look at it, and then say whether he wishes to change his answer or not.

Judge MORAN: Exactly. (To the witness:) Do you wish to change your answer?

A. No, sir.

192 Q. How?

A. No, sir.

Q. You say that paper is not drawn for the payment of money?

Mr. BARNES: I object; the paper speaks for itself.

The COURT: The paper speaks for itself.

Judge MORAN: The paper is not in evidence.

The COURT: Well, when it is in evidence.

Judge MORAN: Both doors cannot be closed to the cross-examination of this witness as to custom. Either the paper is admissible in evidence or else the witness' statement is admissible in evidence.

The COURT: Quite likely that the paper may be admissible in evidence. That's not the question. The question is upon the interrogatory which you have propounded, which is before the court. You ask him what that paper is.

Judge MORAN: No; I ask him if he does not know that there was money drawn by the secretary, by the order of the secretary direct, to be paid out of Dreyer's bank by other means than by warrants. He says it was by warrants upon Dreyer, treasurer.

The COURT: I understand he has answered that question. I have ruled he may.

Judge MORAN:

(Q.) Do you say it was never drawn by other means than by warrants on Dreyer?

A. Yes, sir.

Mr. BARNES: He has answered that.

193 The COURT: He has answered the question once.

Judge MORAN: How did you answer it?

Mr. BARNES: I object to it.

Judge MORAN (to the reporter): What is the answer.

(The answer was read as follows:) "Yes, sir."

Q. Do you mean it was drawn by other means than by warrants or that it was not drawn by other means than by warrants on Dreyer, the treasurer?

A. It was not drawn by other means.

Q. It was not drawn by any other means. I will ask you to look at those three papers shown you and see then if you still say that money was not drawn out of the fund of the West park board on E. S. Dreyer & Co. by other means than by warrants drawn upon E. S. Dreyer, treasurer, signed by the secretary and auditor. (Handing witness papers.)

A. The warrants that those letters refer to were drawn on the treasurer.

Q. The warrants? Well, I say do you say now that it was not; do you still say that money was not drawn or not paid out of Dreyer & Co.'s by the order of the West park board except upon an order drawn by or a warrant drawn upon Dreyer and signed by the secretary and auditor of the West park board?

A. Yes, sir.

Q. You do say so?

A. Yes, sir.

Q. Don't you know that cash was directly paid out over the counter of E. S. Dreyer & Co. by authorizations such as I put
194 in your hand now, without any warrant whatever being drawn on E. S. Dreyer, treasurer, signed by the secretary and the auditor, to pay interest and to pay bonds?

A. Yes, sir.

Q. You do know that?

A. Yes, sir.

Q. Well, then, it was drawn in some other way, wasn't it, than by warrant upon the treasurer, signed by the secretary and the auditor—taken out of the bank in some other way, wasn't it?

A. Yes, sir.

Q. Well, it is simple to get at. Did you notice, Mr. Kennedy, the signature on each one of those three letters (referring to the papers last shown the witness) or orders, or whatever you want to call them?

A. Yes, sir.

Q. Is that the signature of the then secretary?

A. Yes, sir.

Q. Talty?

A. Yes, sir.

Q. Let them be marked merely for identification now.

(The papers were marked respectively "Kennedy A," "Kennedy B," "Kennedy C.")

Q. You say there were two sources from which the West park board got money: one was from the sale of its bonds and the other was from the collection of taxes?

A. Yes, sir.

Q. And that was all the money that went into its account, was it?

A. Well, there was a small amount of what we call miscel-
195 laneous receipts—money collected around the parks.

Q. Small amounts?

A. Yes, sir.

Q. From various sources?

A. Yes, sir.

Q. From any other source that went into the books of the West park commissioners and into their bank account?

A. Well, the interest also.

Q. The interest paid by the treasurer?

A. Yes, sir.

Q. Have you got that account here?

A. Yes, sir; I believe I have.

Q. You have that interest account here?

A. Yes, sir.

Q. Have you the account here showing all the moneys paid over to the treasurer by the county treasurer?

A. No, sir.

Q. Have you the account here showing all the money that came

into the hands of the treasurer from the sale of the bonds of the West park commissioners?

A. No, sir.

Q. You have the account here showing the interest that came to the West park commissioners from the treasurer?

A. Yes, sir.

Q. Can you state the amount of that?

A. I would have to refer to the book.

Q. You can't state it from recollection?

Mr. BARNES: The book is here.

Judge MORAN: They had a printed report the last time, which was a simple way of getting it—a printed report.

196 Mr. BARNES: I think it appears in the account all along. Here is the book if you want to refer to it (indicating), if you want the amount.

Judge MORAN: Well, we will get it in in a simple way. Here is the report I think we used before (indicating).

Q. Look at this I show you (handing witness a pamphlet). What is that, a report?

A. Yes, sir.

Q. Is that gotten out by the West park commissioners?

A. Yes, sir.

Q. Did you have anything to do with getting it out, Mr. Kennedy?

Mr. BARNES: I will admit it is a correct report of its contents.

Judge MORAN:

Q. On the page before you do you find reported the amount of interest received from the treasurer for the year 1894?

A. Yes, sir.

Q. How much?

A. $3,529.05.

Q. What page of the book do you find that statement on, of the report for 1894?

A. Page 10.

Q. I show you the report for 1895 (handing witness book). Do you find it?

A. Yes, sir.

Q. Is that the report for 1895 sent out by the West park commissioners?

A. Yes, sir.

Q. You had to do with the preparation of that?

A. Yes, sir.

Q. Do you find there the statement of the interest received from E. S. Dreyer, treasurer?

A. Yes, sir.

197 Q. For that year?

A. Yes, sir.

Q. On what page do you find it?

A. Page 36.
Q. What is the amount?
A. $3,405.02.
Q. I show you the report of the West park commissioners for 1896. I think that is —, Mr. Kennedy (handing witness book)?
A. Yes, sir.
Q. What page do you find it is on there in that report?
A. Page 35.
Q. Do you find the item of interest there?
A. Yes, sir.
Q. How much?
A. $4,251.06.

Judge MORAN: These minutes, your honor, of the West park board, which were introduced yesterday, in pamphlet form, the certificate is that it is a true record of the whole of a certain day's proceeding, and sometimes I believe it is confined to a day's proceeding.

Mr. BARNES: I think so—one meeting.

Judge MORAN: Now, I want it understood that they go in—the whole minutes—and each one have a right to use such portions——

The COURT: All that is contained in the pamphlet.

Mr. BARNES: Well, very well. Then the understanding is that with each one of those exhibits either one can use any portion thereof. Is that right?

Judge MORAN: Any portion thereof that is competent evidence.

Mr. BARNES: How are you going to determine what is competent?

198 Judge MORAN: I suppose the judge will have to do that.

The COURT: The only condition is this, that upon an attempt to use any portion, either in argument or otherwise, the question will then have to be presented to the court as to what is competent.

Mr. BARNES: Then that matter is reserved until you offer portions of it.

Judge MORAN: I suppose that will have to be the way. I merely want it now to be understood that I don't have to offer these the same as certified copies. Your honor has permitted them to go in as certified copies.

The COURT: Yes, sir.

Judge MORAN: The portions that I will want to offer I will specify, and the question will arise then as it does on what counsel offers.

The COURT: Yes, sir.

Mr. BARNES: In other words, you want to read from those exhibits certian portions.

Judge MORAN: Which I will offer when I come to it.

Redirect examination by Mr. BARNES:

Q. There has been shown to you from printed annual reports of the West Chicago park commissioners the printed reports of the sec-

retary for each year, in which he refers to receiving from
199 Edward S. Dreyer, treasurer, interest to a certain amount.
Do you know whether or not Edward S. Dreyer ever paid that interest?

Judge MORAN: Do you know anything about it?

Mr. BARNES: That is what I am asking. Do you know whether he ever paid any such interest?

A. I only know from the reports he made from month to month.

Q. Do you know how that report was made out—from what?

A. From the books kept in the office.

Q. How was the interest item—how was knowledge of the interest item acquired by the secretary to make his report?

A. Why, about the first of each month he would report that he had credited our account with interest for the previous month.

The COURT: Who would report that he had credited you?

A. Mr. Dreyer.

Mr. BARNES:

(Q.) Was that contained in his regular monthly report?

A. Yes, sir.

Judge MORAN: If there is anything contained in the report, the best evidence is that report.

Mr. BARNES: The best evidence of interest would be whether he had paid it or not, too.

Judge MORAN: I ask that that remark of the State's attorney be stricken out, your honor.

The COURT: I don't see that the remark is so objectionable as to be stricken out.

Judge MORAN: It is a remark to the jury, not on the evi-
200 dence, and not an argument.

Mr. BARNES: Let it be stricken out.

Q. Now what I asked you was this: From what did the secretary make up his report of this amount of interest received from Mr. Dreyer—what paper or what, if any, information did he have to make up that report?

A. From the monthly report that Mr. Dreyer sent to him.

Q. Now, you stated, in response to a question by Judge Moran, that moneys were paid out of the account in Dreyer's bank in other ways than by warrants upon the West park board's treasurer, Mr. Dreyer. Were you there to see them paid out?

A. No, sir.

Q. Do you personally know that they were paid out?

A. I know that bonds were redeemed and interest paid.

Q. What do you mean by——

Judge MORAN: Speak a little louder, so we can all hear you.

Mr. BARNES: Speak a little louder.

A. Why, the cancelled bonds were returned to us. They were supposed to have been paid.

Q. That is, the bonds issued by the West park board on which

interest was due—when the interest was paid the bonds were returned to you. Is that right? Coupons, I mean—the interest coupons.

A. The coupons.

Q. The interest coupons?

A. Yes, sir.

Q. Those coupon interest notes or coupons were paid out of the West Chicago park board's account without any special draft
201 on the treasurer. Is that what you mean?

A. Yes, sir.

Q. And you don't know how it was taken out of the fund, do you—out of the fund at the bank? Do you know the *modus operandi* at the bank?

A. Yes, sir.

Q. Who took it out of the amount at the bank, of your own knowledge?

Judge MORAN: Of your own knowledge, not what you think or infer.

A. No, sir; I don't.

Mr. BARNES:

Q. Do you know whether the treasurer was ordered by the board to pay out the coupons for interest—the interest notes?

Judge MORAN: I object. If there is any order of the board it can be shown.

Mr. BARNES: You have called out the fact that money was paid out in other ways. Now, we purpose to show whether it was actually paid out by the treasurer.

Judge MORAN: If you have got an order, all right.

Mr. BARNES: He says the money was paid out in other ways than on warrants. Now, I ask you what other ways was the money paid out than by warrants.

A. Paid out for the redemption of bonds and interest.

Q. Redemption of bonds and interest? How was it paid out—on whose order?

202 A. The interest coupons specified that the treasurer of the West park board was to pay the interest due.

Judge MORAN: I ask that that be stricken out, what the interest coupons specify.

The COURT: He cannot state what the interest coupons contain.

Mr. BARNES: He is testifying now as to the method of business.

Judge MORAN: He is testifying there as to the contents of the coupons.

Mr. BARNES: This witness is called upon to testify as to the method of doing business, how the moneys were drawn out. He has stated that the West park board did not check anything out of this account; that it was only drawn out by warrants on the treasurer, and he identified a warrant here and said that they were that form.

Judge MORAN: The only warrant that he identified was a war-

rant on the account of the treasurer to get the money into the bank That was the way it got in from the county treasurer.

Mr. BARNES: He stated, in a general way, that the only way that money was drawn was by a warrant drawn on the treasurer. Then counsel upon the other side sought to show that there was an additional method of business of drawing out moneys, not by warrants,
but that moneys came out in some other way. It was drawn
203 out by counsel that the only other way it was drawn out
was to pay bonds and interest maturing. Now, I think it is competent, without bringing the bonds here, to show that the bonds and the coupons themselves were an order from the very beginning; when issued by the board were an order upon the treasurer, and the treasurer had a right to pay those out without any special order, and that a mere letter to him telling him, "Here, these coupons are presented for redemption," which is a mere notification of the fact that they have come in for redemption, and that the order on the bonds themselves, which was the primary order by the board issuing the bonds, authorized the treasurer to pay it out, and therefore it constituted an order from the beginning on the treasurer *from the beginning* to pay out the money on those bonds and coupons.

The COURT: I have no doubt about his right to testify as to the method of paying bonds and interest coupons attached—that is, so far as he knew, so far as he saw, that bonds came back cancelled or otherwise to the office of the West park board; but what I think he cannot testify to is as to the contents of any bonds or coupons.

Mr. BARNES: Of course, in a way, that is true, but I think we can show that he can testify to this, that all bonds and coupons were presented directly at the treasurer's office for redemption and were paid by him.

The COURT: Well, he can testify that the method of doing
business was for parties to go, not to the office of the West
204 park commissioners, but to the treasurer, if he knows that.
He can testify to that if he knows it, if it was a habit at that office; that it was not the habit of the West park commissioners to redeem their bonds or the interest on them at their office, but that they came back to them when they were paid, as they understood from the treasurer.

Judge MORAN: If your honor please, these matters are only material for the purpose of compelling the State to put in here the actual papers. They are attempting to put a case in here without producing the actual warrants which were drawn upon the treasurer. They are attempting to do it without bringing the thing before this jury that I want brought before this jury. I am only insisting upon the regular rule of evidence, that the papers spoken of issued by the park board, that any instrument shall be produced and let us see what is on it—who endorsed it, who it was drawn upon, where it was paid. That is the thing. Now, he went into the course of business. I suppose I might have objected at the very outset, as to the course of business, that it should be shown by the

papers which are in the control and possession of the State's attorney.

Mr. BARNES: No; they are not.

Judge MORAN: But I knew I could on cross-examination show a different course of business from the course he states. I have shown it. Now, counsel undertakes on redirect examination to prove the contents of some instrument. I object to that.

205 Mr. BARNES: I have abandoned that position.

The COURT: The contents of the instruments cannot be shown, but he can show what the course of business was. If he had the bonds here they would show of themselves whether they were paid at the office of the park commissioners or not.

Mr. BARNES: In order to show a course of business, that does not involved producing all of the vouchers and all the warrants and all the bonds and all the coupons that have been issued and paid and filed away in the concern. You can tell how they did their business.

The COURT: There is no doubt about that.

Mr. BARNES: I think the court is right, that I cannot show the contents of bonds.

Q. Have you at the West park board of commissioners any of these cancelled bonds?

A. Yes, sir.

Q. And any of the cancelled coupons?

A. Yes, sir.

Q. That were paid in the manner you speak of while Mr. Dreyer was treasurer?

A. Yes, sir.

Q. Will you bring them here when you come back the next time?

A. Yes, sir.

Q. Now, do you know of any other moneys being paid out by the treasurer or out of this account that is referred to than those that were paid out and liquidated, the cancelled bonds and coupons, except those that were paid out on warrants drawn on the board's treasurer?

206 Judge MORAN: I object to that. It is not redirect examination. The witness first stated that everything was paid out on warrants drawn on the treasurer. I have drawn out that it was paid out in this other way.

Mr. BARNES: I thought you wanted everything before the jury.

Judge MORAN: I want all your papers before the jury.

The COURT: I think that question is admissible. The objection is overruled.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. (The question was read.)

A. We have some rebate vouchers, too, that were paid by the treasurer.

Mr. BARNES: Some what?

A. Rebate vouchers.

Q. What are those?
A. Money paid back on special assessments.
Q. Money paid back to whom?
A. To owners of property that had been assessed for boulevard improvements.
Q. How were they paid out?
A. They were paid out on the vouchers payable by the treasurer.
Q. Well, did the park people pay the money out there or did the treasurer pay it out?
A. The treasurer paid it out.
Q. Well, then, is there anything else that you know of?
A. I don't recollect anything else.

207 Recross-examination by Judge MORAN:

Q. When you speak about vouchers or special assessments, weren't those special assessments paid back by a paper drawn on E. S. Dreyer & Co., or direction given to them?

Mr. BARNES: If there is such a paper it ought to be presented.
Judge MORAN: Very well, you have gone into it. You have asked your witness whether they were not paid upon vouchers.
Mr. BARNES: You are asking the very same thing I asked for in regard to bonds—the contents of papers.
Judge MORAN: You have got by your direct questions that it was paid by a voucher. I have a right to cross-examine.
The COURT: I think he may answer.

Judge MORAN:

(Q.) Weren't they drawn on E. S. Dreyer & Co.?
A. I think not. I think they were drawn on the treasurer.
Q. You think they were drawn on the treasurer? Were they drawn the same as the other warrants you spoke of—signed by the secretary and the auditor?
A. They were signed by the secretary and the president.
Q. The secretary and president. Is this one of them (handing witness paper) or this (handing witness another paper)?

Mr. BARNES: Are those the papers that were identified before?
Judge MORAN: Yes, sir; those are the papers that were identified before.

208 A. No, sir.
Q. That is not one of them?
A. No, sir.
Q. You have one of them, have you? See if that is one, Mr. Kennedy (handing witness paper).
A. No, sir.
Q. Have you read this one (indicating)?
A. Yes, sir.
Q. That is not what you refer to——
A. No, sir.

Q. As a direction to pay a special-assessment order?
A. No, sir.
Q. Those papers came back to you, didn't they?
A. Yes, sir.
Q. You have got them in your possession?
A. Yes, sir.
Q. Are they here?
A. No, sir.
Q. You will produce those, will you?
A. Yes, sir.

Mr. AUSTRIAN: Judge Moran showed the witness just now Exhibit "Kennedy A" and Exhibit "Kennedy C."

Re-redirect examination by Mr. BARNES:

Mr. BARNES: I omitted to introduce a paper yesterday (handing a paper to Judge Moran).
Judge MORAN: All right.
Mr. BARNES: Is this the signature of E. G. Schubert, secretary of the board, and the seal thereof (handing witness the paper)?
A. Yes, sir.

Mr. BARNES: I offer this in evidence as "State's Exhibit
209 N" and read from it as follows:

"Board of West Chicago park commissioners.

Regular meeting, Tuesday, January 9th, 1900.
Official record published by authority of the board of West Chicago park commissioners.
Meeting called to order at 4 o'clock p. m. by the president.
Roll-call.
Present: Commissioners Blount, Fowler, Graham, Kopf, Pavlicek, and President Sudgard. Absent: Commissioner Petersen (page 2381).
On motion, it was, on vote, ordered that this board do now go into executive session.
On motion, it was, on vote, ordered that this board do now proceed to the order of election of officers and employees for the ensuing year.
Nomination of officers.
Commissioner Graham nominated Commissioner Blount for treasurer of the board, which was seconded by Commissioner Kopf. No other nominations being made, on motion of Commissioner Graham, the secretary was directed to cast one ballot as the vote of the board in favor of F. M. Blount for treasurer. The ballot was accordingly cast by the secretary and Commissioner Blount declared duly elected treasurer of the board.
Commissioner Fowler nominated Ernest G. Schubert for secretary of the board, which was seconded by Commissioner Graham. No
other nominations being made, on motion of Commissioner
210 Fowler, the president was directed to cast one ballot as the vote of the board in favor of Mr. Schubert for secretary. The

ballot was accordingly cast by the president and Ernest G. Schubert declared duly elected secretary of the board for the ensuing year.

Commissioner Blount nominated Thomas P. Kennedy for assistant secretary of the board, which was seconded by Commissioner Kopf. No other nomination being made, on motion of Commissioner Blount, the secretary was directed to cast one ballot as the vote of the board in favor of Mr. Kennedy for assistant secretary. The ballot was accordingly cast by the secretary and Thomas P. Kennedy declared duly elected assistant secretary of the board.

On motion, the board adjourned at 6.30 o'clock p. m.

ERNEST G. SCHUBERT, *Secretary.*

STATE OF ILLINOIS, }
County of Cook, } ss:

I, Ernest G. Schubert, secretary for the West Chicago park commissioners, do hereby certify that the above and foregoing printed pamphlet, entitled "Board of West Chicago Park Commissioners, regular meeting, Tuesday, January 9th, 1900," is the original presented to and approved by said West Chicago park commissioners upon the 23rd day of January, 1900.

In witness whereof I hereunto subscribe my name and affix the corporate seal of said West Chicago park commissioners this 23rd day of January, A. D. 1900.

E. G. SCHUBERT, *Secretary.*"

[Seal of the West Chicago Park Commissioners.]

211 Re-recross-examination by Judge MORAN:

Q. Mr. Kennedy, you have at the board office blank books like this (showing witness a book), showing the whole proceedings for a year of the board, in print, bound like this, haven't you?

A. Yes, sir.

Q. You have them there for the years 1894, 1895, and 1896?

A. Yes, sir.

Q. Will you be kind enough to bring a volume of each year when you come back?

A. Yes, sir.

Mr. BARNES: I think you have got the volumes for two years.

Judge MORAN: We have only the later ones, and I will reserve the right, when you come back, of a further brief cross-examination of the witness. All I have got to say now in this particular matter is that you are sure enough assistant secretary of the board?

A. Yes, sir.

212 Mr. BARNES: Judge Moran, it is a little out of the order—Mr. Blount—Mr. Jackson is a rather busy man. I want to call him on now.

Mr. MORAN: Put him on now. Call him any time you want to.

FRED M. BLOUNT, called as a witness on behalf of the State, having been first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. What is your full name?
A. Fred M. Blount.
Q. Are you the Fred M. Blount referred to as treasurer of the West Chicago park board of commissioners?
A. Yes, sir.
Q. When were you first treasurer of the park commissioners?
A. Well, I can't give you that date. It is a great many years ago that I was first elected treasurer. I should say——
Q. Do you remember when Mr. Edward S. Dreyer became treasurer of the West Chicago park commissioners? I don't mean the date. Do you remember the fact of his becoming treasurer?
A. Yes, sir.
Q. Do you know whom he succeeded?
A. He succeeded myself.

Mr. BARNES: Yes; there is no dispute about that being
213 the year 1894.

Q. (Paper handed witness.) Now, look at this paper which I hand you. Whose signature is that to that paper as secretary?
A. Signed by Harry Wilkinson, secretary.
Q. Was he then secretary of the board at that time?
A. Yes, sir.
Q. Is that his signature?
A. Yes, sir.
Q. And whose signature is the signature "J. J. Townsend"?
A. He was the acting president of the board.
Q. Is that his signature?
A. Yes, sir.
Q. Whose signature is on the margin of the paper, under the words "This warrant is payable at" ——
A. Mine.
Q. "At Chicago national bank?"
A. It is mine.
Mr. MORAN: I did not catch that.
The WITNESS: Mine.

Mr. BARNES:

Q. Whose signature is on the back of the paper?
A. Mr. Dreyer's.
Q. The defendant here?
A. Yes, sir.
Q. Now, there is a voucher connected with that, and will you state whose signatures are here at the bottom?
A. J. J. Townsend, F. M. Blount, and A. J. Graham.
Q. In whose handwriting are those signatures?
A. Why, Mr. Townsend's, Mr. Blount's, and Mr. Graham's.
Q. The persons whose names purport to be signed there?

A. Yes, sir.

214 Q. Whose signature is this at the bottom on the back under the words "Received payment in full of the within account against the West Chicago park commissioners"?

A. That is Mr. Dreyer's signature.

Q. The defendant?

A. Yes, sir.

Q. Now, look at the signatures on a similar warrant and similar voucher where the same names appear and state whether those signatures are the signatures of the parties whose names purpose to be signed there in each instance.

A. Yes, sir.

Q. Were these warrants on you paid?

A. Yes, sir.

Q. To whom?

A. To Mr. Dreyer.

Mr. MORAN:

Q. Mr. Blount, you did not pay out the money yourself on these, did you; actually count it out over the counter?

A. No, sir.

Q. You did not see it counted out by anybody?

A. No, sir.

Q. Look at that stamp on them (indicating) and see how it was paid.

A. Yes; paid through the clearing-house to the National Bank of Illinois.

Q. How is this one (indicating)?

A. The same way.

Q. Paid through the clearing-house to the National Bank
215 of Illinois?

A. Yes, sir.

Q. Now, the funds, the actual funds, Mr. Blount, on which these—out of which this was paid—it was money of the West park board?

A. Yes, sir.

Q. And it was in the Chicago national bank?

A. Yes, sir.

Q. Of which you were cashier?

A. Yes, sir.

Q. Cashier then and now, are you not?

A. Yes, sir.

Mr. BARNES: Let them be marked as—they are already marked Complainant's Exhibit 3, Complainant's Exhibit 4. They are marked that way, but I have the others marked State's exhibits. Let these be marked—they are marked 3 and 4 already——

Mr. MORAN: Anyway, so we don't get confused by the letters or numbers.

Mr. BARNES: Yes; let them be marked State's Exhibits O and P respectively.

(Said exhibits were marked "State's Exhibits O and P" respectively.)

Said exhibits are in words and figures as follows, to wit:

(The warrant:)

STATE'S EXHIBIT O.

"No. 2.

"CHICAGO, *April* 13, 1894.

"Treasurer of West Chicago park commissioners

216 "Pay to the order of E. S. Dreyer, treasurer, two hundred and forty-nine thousand twenty-four and $\frac{75}{100}$ dollars for transfer of funds.

"(Signed) J. J. TOWNSEND,
"Acting President.
"HARRY WILKINSON, *Secretary.*

"$249,024.75."

Across the end of the warrant, at the left, are the words: "This warrant is payable at the Chicago national bank. (Signed) F. M. Blount, treasurer."

On the back are the following endorsements:

"E. S. Dreyer, treasurer"—in ink.

(Rubber stamp:) "E. S. Dreyer & Co. Paid."

"Pay through Chicago clearing-house only, April 12, 1894, to the National Bank of Illinois."

(Rubber stamp:) "Paid through Chicago clearing-house. No. 6. April 14, 1894. To No. 12. The National Bank of Illinois."

(Rubber stamp:) "Chicago national bank, Chicago, April 14, 1894. Paid."

(Also the following marked in lead pencil:)

"State's Exhibit 3." "State's Exhibit 5," with a letter "O" marked over it.

(Said warrant is perforated with two stars.)

(The voucher attached to said warrant is as follows:)

"CHICAGO, *April* 13, 1894.

West Chicago Park Commissioners to E. S. Dreyer, Dr.

217 To all moneys in hands of treasurer, F. M. Blount, to credit of following funds:

5 per cent. sinking fund of 1879	$14,118.09
5 per cent. sinking fund of 1891	105,165.16
Ashland Avenue assessment	2,119.96
Ashland Avenue second assessment	1,449.61
Ashland Avenue widening assessment	461.26
Humboldt Boulevard assessment, division 1	4,190.07
Humboldt Boulevard assessment, division 2	400.29
Jackson Boulevard assessment	62,599.61

Warren Avenue, W. 40th, and Washington Street assessment	2,810.73	
Douglass Boulevard assessment	329.80	
Special improvement fund	58,036.56	
		251,681.14
Less amounts overdrawn on following funds:		
12th Street and Ogden Avenue assessment...	$2,568.79	
General fund	87.60	
		2,656.39
		249,024.75

Approved:
J. J. TOWNSEND,
Acting Chairman.

F. M. BLOUNT,
A. J. GRAHAM,
Committee on Finance, W. C. P. Com's.

218 The secretary will issue warrant on treasurer for $249,024.75."
Additional marks on the face of said voucher in pencil:
"Complainant's Exhibit E. State Exhibit 5."
On the back of said voucher the following:
(Across one end:) "General fund," ruled out in red ink.
"Warrant No. 2. E. S. Dreyer, treasurer.
"For transfer of funds to treasurer-elect, $249,024.75. Dated April, 1894. Charge to —— ——.
"Received payment in full of the within account against the West Chicago park commissioners.
(Signed) E. S. DREYER, *Treasurer.*"

(The warrant:)

STATE'S EXHIBIT P.

"No. —.

"CHICAGO, *April* 13, 1894.

"Treasurer of the West Chicago park commissioners

"Pay to the order of E. S. Dreyer, treasurer, thirty-five thousand one hundred thirty-four and $\frac{40}{100}$ dollars for transfer of funds.
"$35,134.40. J. J. TOWNSEND,
"*Acting President.*
"HENRY WILKINSON, *Secretary.*"

Endorsed across the end of said warrant, at the left, are the words:
"Payable at the Metropolitan national bank," in writing;
219 "Chicago national bank," in print, being ruled out in red ink. "F. M. Blount, treasurer."
Additional marks on the face of said document are:
"Complainant's Exhibit 4. State's Exhibit 6," marked over with a letter P, all in pencil; also in pencil, "Burlington viaduct fund."

On the back of said warrant are the following endorsements: "E. S. Dreyer, treasurer."
(Rubber stamp:) "E. S. Dreyer & Co. Paid."
"Pay through the Chicago clearing-house only."
"May 5th, 1894. To National Bank of Illinois."
Said warrant was perforated with the word "Paid."
The voucher accompanying the warrant reads:

"West Chicago park commissioners.

CHICAGO, *April* 13, 1894.

To E. S. Dreyer, Dr., treasurer West Chicago park commissioners.

All moneys in hands of treasurer, F. M. Blount, to credit of following funds:

Burlington viaduct fund	34,920.83
Southwest Boulevard assessment	213.57
	35,134.41

Approved:
J. J. TOWNSEND,
Acting Chairman.
F. M. BLOUNT,
A. J. GRAHAM,
Committee on Finance, W. C. P. Com's.

The secretary will issue warrant on the treasurer for $35,134.41.
——— ———, *Auditor.*"

220 Also on the face of the document in pencil:
"Complainant's Exhibit 4. State's Exhibit 6."
Endorsed on the back of said document:
"Warrant No. 3. E. S. Dreyer, treasurer. For transfer of funds to treasurer-elect, $35,134.40. Dated April, 1894. Charge to ——— ———.

Received payment in full of the within account against the West Chicago park commissioners.
(Signed) E. S. DREYER, *Treasurer.*"

Mr. BARNES:

Q. Mr. Blount, are you now acting treasurer of the West Chicago park commissioners?

Mr. MORAN: I object—the acting treasurer.
The COURT: I think he may answer.
Said objection on behalf of the defendant was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. I am under the impression that I am the treasurer.

Mr. BARNES:

Q. Well, are you acting treasurer?
A. Yes, sir.

Q. How long have you been acting as treasurer, or since——

Mr. MORAN: I object to that.

The COURT: He may answer.

221 Said objection was overruled by the court; to which ruling of the court the defendant, by *its* counsel, then and there duly excepted.

A. I think it was about December 21st, or along there, 1896, the first time I was elected. I have been elected every year.

Mr. BARNES:

Q. Since that time?

A. Yes, sir.

Q. Whom did you succeed as treasurer?

A. Mr. Dreyer.

Q. Have you ever made a demand—in the first place, I will ask you have you ever received any funds, moneys, securities, or property of any character from Mr. Edward S. Dreyer, the defendant, since you have been acting as treasurer, or since December 21st, 1896?

A. No, sir.

Q. Have you made any demand on him therefor?

A. Yes, sir.

Q. When did you make that demand?

A. On the 31st of January——

Mr. MORAN: Wait a minute. If that is an attempt to validate a demand, we object to it.

Mr. BARNES: Let him state the time.

The COURT: He can answer the question.

Mr. MORAN: Wait a minute. Was it in writing?

Mr. BARNES: I will show it in writing.

222 Mr. MORAN: Well, whether it was a demand or not——

Mr. BARNES: Well, it was both in writing and verbal; both verbal and in writing. There was conversation as well.

Mr. MORAN: What year do you mean?

Mr. BARNES: That is January 31st, eighteen hundred and what year?

The WITNESS: Eighteen ninety-nine, I believe it was; eighteen ninety-eight.

Mr. MORAN: That is all right. I thought perhaps you were speaking about another date.

The WITNESS: It was the other demand; yes.

Mr. MORAN: What is the date?

Mr. BARNES: The 31st of January, 1899, my copy shows.

Q. In what city, county, and State did you make that demand?

A. City of Chicago, county of Cook, State of Illinois.

Q. Did you say anything to him the time you made the demand?

A. Yes, sir.

Q. Do you remember what it was?

A. I asked him if he desired me to read this demand to him, and he said no; that he would take it and submit it to his lawyers, and that all he wanted was that the thing would be legal and right. He promises to give me an answer in the next day or two. The day or two has never come.

Q. Have you ever heard from him since?

A. Yes, sir.

223 Q. You have a paper in your hand which you call the demand. Did you give him any paper?

A. Yes, sir; I kept a copy and gave him a copy of this instrument.

Q. Sign them both yourself?

A. Yes, sir.

Q. Both alike?

A. Yes, sir.

Mr. BARNES: I offer in evidence the demand; I will read it into the record.

Mr. MORAN: I object to the demand, not for anything on the face of it, your honor, but your honor understands the reasons, I suppose. I will make it plain hereafter.

The COURT: Yes; the objection is overruled.

Said objection on behalf of the defendant was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES: I will read the demand into the record.

Thereupon Mr. Barnes read in evidence the document referred to and which had been produced by the witness, as follows:

"To Edward S. Dreyer, ex-treasurer of the West Chicago park commissioners.

"SIR: As the present treasurer of the West Chicago park commissioners and as your successor to that office, which I have held and retained since succeeding you, on December 21st, 1896, I

224 hereby demand that you pay and deliver over to me as such treasurer, and as your successor in such office, all moneys, funds, and securities which you have received as such treasurer and which have not been by you lawfully paid out.

"In case you are not now ready to comply with this demand, I will be present, ready to receive such moneys, funds, and securities in the office of the Chicago national bank, in building on the southwest corner of Dearborn and Monroe streets, in the city of Chicago, county of Cook and State of Illinois, on any day from now until and including Thursday, February 2nd, 1899, between the hours of 9 a. m. and 4 p. m. of each day, or I will be at any place you may designate for such purpose, at any time on any day within such period, and I now and here hold myself ready to receive the same, or to go with you to any place you may designate for the delivery and the reception of the same, and your failure to pay or deliver over to me such moneys, funds, and securities within such period will be deemed a refusal on your part to comply with this demand.

"Should you undertake to deliver the same at the place named aforesaid, within such period, and by any event I should not be present, I hereby authorize Thomas M. Jackson, assistant cashier of such bank, to receive, and in my name as such treasurer, to receipt for any moneys, funds, or securities that you may see fit to
225 deliver in compliance with this demand.

"F. M. BLOUNT,
"*Treasurer West Park Commissioners.*

"Chicago, Illinois, January 31st, 1899."

Q. Have you, since making that demand, ever received any moneys, funds, or securities from Mr. Dreyer?
A. No, sir.

Cross-examination by Mr. MORAN:

Q. You knew, at the time you made that demand on Dreyer, that the Illinois national bank had failed and was in the hands of the United States receiver, didn't you?

Mr. BARNES: I object. It is immaterial, not cross-examination.
The COURT: I do not see how that is material.
Mr. MORAN: I will take a ruling on it.
The COURT: The objection is sustained.
Said objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. Besides being treasurer of the West park board, are you one of the commissioners?
A. Yes, sir.

Q. One of the commissioners. You knew at the time you
226 made this demand that the West park board had at that time recovered a judgment against the Illinois national bank for $316,000.00, didn't you?

Mr. BARNES: I object to it as immaterial.
The COURT: The objection is sustained.
Said objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. You knew that the $316,000.00 mentioned in that judgment was the money belonging to the West park board that had come to the hands of Dreyer, didn't you?

Mr. BARNES: That is objected to.
The COURT: The objection is sustained.
Said objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. Didn't you know at the time of making that demand that that

$316,000 was actually set aside by order of the United States court by its decree to be paid to the West park board?

Mr. BARNES: That I object to.

The COURT: The objection is sustained.

Said objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

227 THOMAS M. JACKSON, called as a witness on behalf of the State, having been first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. What is your full name?
A. Thomas M. Jackson.
Q. What is your business, Mr. Jackson?
A. Assistant cashier, Chicago national bank.
Q. Are you the Thomas M. Jackson, assistant cashier, referred to in the demand that was read here in court a few minutes ago?
A. I am.
Q. Have you ever received since that date of that demand, January 31st, 1899, any moneys, funds, or securities, or any property whatsoever, from the defendant, Edward S. Dreyer?
A. No, sir.

Cross-examination waived.

WILLIAM S. BIELFELDT, called as a witness on behalf of the State, having been first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. What is your name?
A. William S. Bielfeldt.
Q. What is your business?
A. Cashier of the county treasurer's office.
228 Q. How long have you held that position?
A. About eight years.
Q. Do you know Mr. A. L. Langworthy?
A. Yes, sir.
Q. Do you know the defendant, Edward S. Dreyer?
A. I know him by sight.
Q. (Book and page shown witness.) Have you seen these warrants that have been referred to in this book? For instance, there is one—I show you one of them, 415, "Office West Chicago park commissioners," dated October 3, 1896. There are several of these warrants, numbered from 378 to 427, inclusive, drawn on Edward S. Dreyer. Are you acquainted with those warrants?
A. Yes, sir.
Q. And the signatures upon them?
A. Yes, sir.
Q. (Papers handed witness.) There are also certain checks, with which you are also familiar, which I here hand you, all of which are

signed with the name "D. S. Kochersperger, county treasurer." You are familiar with those checks, are you?

A. Yes, sir.

Q. Are those signatures there the signature of D. H. Kochersperger?

A. Yes, sir.

Q. What were those checks paid out for, do you know?

A. Paid out for taxes to the West park treasurer.

Q. And they were paid out to whom?

A. Paid out to E. S. Dreyer, treasurer.

229 Q. And was anything presented when they were paid out?

A. Yes, sir.

Q. What?

A. A draft of the West park commissioners.

Q. The warrants that I have shown you, number from 378 to 427, inclusive——

Mr. MORAN: Do these checks exactly correspond with the warrants?

Mr. BARNES: They do in amount. For instance, one check might cover two warrants of the same day, and the check might not be dated until the day following, because the warrant might not be presented until the day after the date.

Mr. MORAN: Well, there is no particular dispute on this; only to avoid confusion.

Mr. BARNES: Now, I offer in evidence those checks which were shown yesterday, and those warrants which were read yesterday—that is, which were referred to by numbers yesterday.

Mr. MORAN: Is that all you want of them, Mr. Barnes?

Mr. BARNES: That is all I want of them. I will just ask one question, Judge Moran.

Q. How did these checks come back into your possession?

A. They were returned by the bank at the end of each month.

Q. And did you keep the account and know whether they were deducted as paid?

A. Yes, sir.

Q. Were they paid?

A. Yes, sir.

Q. Did the county treasurer have the cash there to pay them?

230 A. Yes, sir.

Q. In the several banks upon which they were drawn?

A. Yes, sir.

Q. Payable in United States currency, was it?

A. Yes, sir.

Q. Did you hand out any of these checks——

A. Yes, sir.

Q. —otherwise—did you hand them out to—on any other occasion than the presentation of one of these drafts of the West Chicago park commissioners on the county treasurer?

A. No, sir.

Q. And is that the way the drafts came back into the possession of the county treasurer?

A. Yes, sir.

Q. I would say the warrants; their being taken up by these checks.

A. Yes, sir.

Q. And those warrants represented what *that* were drawn on the county treasurer?

A. That was for money collected for taxes.

Q. For the West park board?

A. For the West Chicago park commissioners.

Cross-examination by Mr. MORAN:

Q. You were asked by counsel if these were paid in United States currency. Did you see any of them paid?

A. No, sir.

231 Q. You don't know what kind of currency they were paid in?

Mr. BARNES: If they were payable. I didn't say paid.

Mr. MORAN: They are simply, "Pay to the order of." You don't know how they were paid, do you?

A. No, sir.

Q. Paid by the bank?

A. Paid by the bank.

Q. You understand these stamps on the back of them, do you?

A. Yes, sir.

Q. (One of the checks referred to shown witness.) You see this one?

A. Yes, sir.

Q. "Paid, through the clearing-house, to the National Bank of Illinois"?

A. Yes, sir.

Q. Is that on each of them, Mr. Bielfeldt? Have you looked to see?

A. I did not look. Supposed to *me*.

Mr. MORAN: Supposed to be?

Mr. BARNES: They will show, anyway, Judge. I think they are on most, if not all. I think they are on all of them.

Mr. MORAN: Now, counsel has offered these checks in evidence.

Mr. BARNES: Better designate them, perhaps——

Mr. MORAN: Well, I was going to raise a question upon them. There is no dispute that these checks, as checks that came—that they were used in the way described, but there are some of these checks dated as early as May 13th, 1895. I do not suppose that counsel pretends that any of these were for money in the

232 hands of Dreyer that he was charged with at the time of the failure or at the time the demand was made.

Mr. BARNES: No; that is not the contention.

Mr. MORAN: Simply money that got, at some time, in his hands?

Mr. BARNES: To identify the account, that is all.

Mr. MORAN: Well, I object to them, then, for the reason that they do not relate to any money in the hands of Dreyer at the time this demand was made or at the time of the failure of the Illinois national bank.

The COURT: Well, I suppose that they show money of the West park board going into the hands of Dreyer, at least, pretend to show it?

Mr. MORAN: Yes; they do show that, your honor.

The COURT: Then, I think they are admissible.

Mr. MORAN: Well, of course—save the exception.

Said objection to the admission of the checks on behalf of defendant was overruled by the court; to which ruling the defendant, by his counsel, then and there duly excepted.

Mr. BARNES: The checks are numbered as follows: 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25. I will state, Judge, that there are three checks that are not endorsed at all, except by the bank.

Mr. MORAN: Just identify them.

233 Mr. BARNES: The others were all identified last night. There are no endorsements on these, except to show that they went through the clearing-house, that is all. I don't particularly care, only it covers completely those warrants, that is all.

Mr. MORAN: Better offer them.

Mr. BARNES: (Papers shown witness.) I show you three checks here. They are marked State's Exhibits 5, 9, and 26. I will ask you whether those checks were also checks of the county treasurer, issued for the same purposes as the other checks which have been introduced in evidence?

A. Yes, sir.

Mr. BARNES: I will offer those in evidence.

Q. And they were returned paid?

A. Yes, sir.

Mr. MORAN: You observe on these there is no endorsement of any name, but "Pay to the National Bank of Illinois"?

A. Yes.

Q. On this one (indicating) you notice the endorsement "guaranteed"—there is no endorsement—"guaranteed by the National Bank of Illinois"?

A. Yes.

Q. "Paid by the National Bank of Illinois." This one (indicating) had no written endorsement on it, but there is "Pay to the National Bank of Illinois"?

A. Yes, sir.

Mr. BARNES: Same as the other checks.

Now, I offer in evidence these several warrants from 378 to
234 427, inclusive. Now, I will have to either read them in the record or have them copied, just as you like.

Mr. MORAN: I only want this: I think they are all competent evidence, your honor, but they are nearly all, as to form, exactly

alike, but they differ as to dates and amounts. Now, you can have one read into the record, and a statement then that the others are identical in form except as to dates and amounts, and counsel can use the others for the jury if he wants to. I only do not want such a lumbering bill of exceptions.

Mr. BARNES: I will do that. I offer in evidence the following paper (reading):

"No. 378. Office West Chicago park commissioners.

CHICAGO, *May* 11, 1895.

Pay to E. S. Dreyer, treasurer West Chicago park commissioners, or order, forty thousand dollars.

(Signed) HARVEY T. WEEKS,
President West Chicago Park Commissioners.
GEORGE F. TALTY, *Secretary.*

To D. H. Kochsperger, county collector, Cook county."

In figures at the corner: "$40,000.00."

On the margin: "Countersigned and registered to credit of general fund. J. M. Oliver, auditor."

Endorsed: "E. S. Dreyer, treasurer."

235 Now, it is agreed that the other warrants are the same in form, differing only in the amounts and dates, and, possibly, the officers signing the same, the number, and difference in the endorsement of the same, as explained by the witness yesterday.

Mr. MORAN: They go into evidence and are similar to this, excepting as to the amounts and number and dates——

The COURT: I think the dates from the one you have read——

Mr. MORAN: The dates, I think, were all read yesterday.

Mr. BARNES: Some of them were and some were not, but they were dated between that time and the last warrant, which is 427 (reading):

"No. 427. Office West Chicago park commissioners.

"CHICAGO, *December* 17, 1896.

"Pay to E. S. Dreyer, treasurer West Chicago park commissioners, or order, nine hundred twenty-nine and $\frac{20}{100}$ dollars.

"HARVEY T. WEEKS,
"*President West Chicago Park Commissioners.*
"GEORGE F. TALTY, *Secretary.*

"To D. H. Kochsperger, county collector, Cook county."

In figures: "$929.20."

Countersigned and registered: "To credit of the 5 per cent. sinking fund of 1895. Carl Moll, acting auditor."

Endorsed: "E. S. Dreyer, treasurer."

236 It is agreed, then, without introducing each one of these warrants, that the other warrants, in between 378 and 427, inclusive——

Mr. MORAN: Identified by the witness yesterday?

Mr. BARNES: Identified by the witness yesterday, shall go into evidence, and that they differ from the warrants read only as to the amounts and dates, and that the checks issued in evidence here were issued to take up those warrants.

Mr. MORAN: I suppose that would be so.

Mr. BARNES: The only thing, in some cases the check bears date the following day, because the warrant was not presented. And it is also agreed that we may hereafter, if we desire, use these warrants in argument to the jury.

Mr. MORAN: Certainly, they are considered in evidence, only we don't want to lumber the thing up.

Mr. BARNES: I understand. That is all.

And it is further agreed between counsel that in lieu of inserting copies of the drafts here mentioned to take up said warrants that the following statement of facts shall prevail as to such drafts.

Said drafts are in the following form:

"CHICAGO. No. —.

Garden City Banking & Trust Company (or whatever bank drawn upon) pay to the order of E. S. Dreyer, treasurer, — dollars, $—.

D. H. KOCHERSPERGER,
County Treasurer.

W. D. ANDERSON,
Assistant Treasurer."

Endorsed: "E. S. Dreyer, treasurer; E. S. Dreyer & Company. Paid through Chicago clearing-house. Date, ——. To the National Bank of Illinois."

And are for the following amounts and numbers:

No. 47, $40,000; 144, $30,000; 85, $40,000; 53, $14,248.04; 74, $40,000; 217, $25,000; 416, $25,000; 222, $30,000; 256, $25,000; 302, $50,000; 314, $50,000; 308, $25,000; 288, $25,000; 319, $37,500; 368, $50,000; 145, $35,000; 104, $40,000; 291, $19,434.06; 106, $50,651.95; 188, $40,000; 491, $8,934.98; 405, $60,000; 99, $25,000; 284, $40,000; 314, $40,000; 237, $25,000.

GEORGE F. TALTY, called as a witness on behalf of the State, having been first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. What is your name?

A. George F. Talty.

Q. Are you the George F. Talty who was secretary of the West Chicago park commissioners?

A. Yes, sir.

237 Q. How long were you secretary of the West Chicago park commissioners?

A. January, 1895, until August, 1897.

Q. During that time who was the acting treasurer?

A. Well, until December, the latter part of December, 1896, Mr. Dreyer—E. S. Dreyer. Then, from that time on, Fred M. Blount.

Q. Mr. Talty, were you acquainted at that time, during your connection with the West park board, in such office, with the bank of E. S. Dreyer & Company?

A. Yes, sir.

Q. Where was that bank situated?

A. At the southwest corner of Washington and Dearborn streets.

Q. In what county and State?

A. City of Chicago, county of Cook, State of Illinois.

Q. Were you acquainted with the account in that bank known as the West Chicago park commissioners' account?

A. Yes, sir.

Q. Did you ever deposit any moneys to that account?

A. Yes, sir.

Q. Did you, while you were secretary, ever receive any reports from the treasurer?

A. Yes, sir.

Q. (Paper shown witness.) Look at this paper which I hand you. Did you ever see that before?

A. Yes, sir.

Q. Did it come into your hands?

A. Yes, sir; I received it.

Q. You received the report?

A. Yes, sir.

238 Please examine at once.

If no error is reported within ten days the account will be considered correct.

Board of West Park Com'r's in account with E S. Dreyer, treas.

No. canceled vouchers returned —.

CHICAGO, *Nov.* 30, 1896.

DEBIT. CREDIT.

Checks.	Totals.	Checks.	Totals.	Deposits.	
				Date.	Amount.
				Old balance ..	440,283.78
Coupons.....	... ..	627.			
"	.....	180.	.... .	Nov. 4.....	208.33
Rebate vouchers....	.....	7,005.82	.. ...	" 6.....	186.75
Board vouchers. ...	.....	124,816.21	.. ....	" 20.....	60,000.
				" 24.....	95.
				" "	28.15
				Total credits..	500,802.01
				Total debits...	132,629.03
				Credit balance.	368,172.98

239 Q. Did you ever receive any report after this report was received from E. S. Dreyer, treasurer?

A. I don't think so.

Mr. MORAN: What was your question?

Mr. BARNES: Whether he had received any report after this.

Mr. MORAN: From E. S. Dreyer after this paper?

Mr. BARNES: After this paper; yes.

The WITNESS: Not that I recollect.

Q. Well, you recall the date that he ceased to act as treasurer?

A. Yes; about December 22nd, I guess.

Q. Well, Saturday was December 19th of that year, Sunday the 20th, Monday the 21st?

A. The 21st.

Q. Now, how often did you receive reports from him?

A. Each month.

Q. Now, can you recall whether you received any other report after this?

A. Not from Mr. Dreyer, I don't think.

Q. What was done with these reports?

A. Well, as they were received they were turned over to the assistant secretary, who was the book-keeper, and he would compare them with his book and see that they were correct and give the treasurer credit for what the statement showed he had paid out.

Mr. BARNES: I offer this in evidence, & found at preceding page.

240 Cross-examination by Mr. MORAN:

Q. You received, you say, a report each month?

A. Yes, sir; each month—at the close of each month.

Q. Was not that report received from E. S. Dreyer & Company?

A. I don't know. Some of them may have had that heading.

Q. Didn't they all have it?

A. No; I can't say that they did.

Q. The reports should be on file in the secretary's office now, should they?

A. Yes, sir.

Q. They are all kept?

A. Yes, sir.

Q. You don't know who sent this report to you; you simply received this paper?

A. Yes, sir; that is all.

Q. You don't know where it came from?

A. Not positively; no, sir.

Q. It was received at the office of the West park commissioners?

A. Well, I presume so. Some of them I would get personally—went down to the bank around the end of the month; others would be mailed.

Q. This one we are asking about?

A. Well, I can't state as to that particular one just how it was received.

Q. Was it in the condition when you saw it first that it *was* now?
A. I can't say as to that.

Mr. MORAN: Don't know. I object to it.
241 The COURT: Let me see it. I think "condition," Judge Moran, is pretty broad. I do not think that "condition"—it may refer to a great many things.
Mr. MORAN: Well, I am not resting on the question of condition alone, your honor, that is not——
The COURT: If you wish to ask him whether the writing and the figures are the same——
Mr. MORAN: There is no objection to that question. I am objecting to the introduction of the instrument generally.
Mr. BARNES: Well, the court is viewing the paper. I want to ask him some questions on its general condition.
The COURT (to defendant's counsel): Well, I understood your objection was based on his statement that he could not say it was in the same condition now as when he received it. I say I do not think that is sufficient—"condition." Now, there are a good many things besides figures and writing.
Mr. MORAN: My objection does not go to that question alone—or just as to that.

Mr. BARNES:

Q. Now, Mr. Talty, are the figures and amounts here, those in ink the same—are those in the same condition—well, I will put the question in different form. Is all of the printing on that report and all of the writing in ink the same as it was when you received it?
A. Well, I should say so; yes, although I have not had anything to do with any of the papers since 1897. As I have said, they
242 have been in the custody of other people. I should say yes; the same.
Q. There is no appearance of its having been changed, is there, in any way?
A. Not that is noticeable.
Q. Well, the amount there is the same, is it, the balance?
A. Yes, sir.

Mr. BARNES: That is what it — principally offered in evidence for, is the balance.

Q. The lead-pencil marks on there are something you don't know anything about?
A. No, sir.

Mr. BARNES: I offer it exclusive of the lead-pencil marks.
Mr. MORAN: I object to it now. Here is a paper that manifestly some one, I don't know who——
Mr. BARNES: Well, I will withdraw the offer at this time, Judge.
Mr. MORAN: Bring in all the reports.
Mr. BARNES: Mr. Berger will be on soon. He can identify it more fully.

RUDOLPH KOHTZ, called as a witness on behalf of the State, having been first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. What is your name?
A. Rudolph Kohtz.
243 Q. What is your business?
A. Book-keeper at the State Bank of Chicago.
Q. Do you know the defendant, E. S. Dreyer?
A. Yes, sir.
Q. Were you ever connected with him?
A. Yes, sir; I used to work for him; I was employed there.
Q. Employed by whom?
A. The firm of E. S. Dreyer & Company.
Q. Bankers?
A. Yes, sir.
Q. At what place?
A. Well, they were at Washington and Dearborn, two corners. One would be the northeast corner and then the southwest corner.

Mr. MORAN: That is, they were not on two corners at the same time?

A. No.
Q. They moved from one to the other?
A. Yes, sir.

Mr. BARNES:

Q. How long were you in the employ of E. S. Dreyer & Company, bankers?
A. About nine years.
Q. When did you cease to be in their employ?
A. When they failed.
Q. When was that?
A. Some time in the latter part of December.
Q. Well, you were with them up to the time they closed business, were you?
A. Yes, sir.
Q. Now, what did you do while you were in their employ?
A. Well, I started there as messenger and worked up ——
244 Q. Well, what did you do there *laterally?*
A. Book-keeper. I kept books there from M to Z.
Q. M to Z?
A. Yes, sir.
Q. And these general ledgers here—the bank ledgers M to Z, Nos. 11, 12, 13, and 14, here—did you keep those books?

(Counsel, in the above question, has reference to certain books which had been brought into court to be used in connection with the testimony of the witness now upon the stand.)

A. Yes, sir.
Q. Did you keep them in the regular course of business?

A. Yes, sir; I did.
Q. Are they correct?
A. Supposed to be. They were proved every morning.
Q. You compared them?
A. Yes, sir.
Q. Correctly kept, were they?
A. Yes, sir.
Q. Did you keep the account known in these books as the West Chicago park commissioners' account?
A. Yes, sir.
Q. And that account is correctly kept?
A. Yes, sir.
Q. Were the balances of E. S. Dreyer & Company and of the different accounts in E. S. Dreyer & Company, including the West Chicago park commissioners', determined by this ledger?
A. Yes, sir.
Q. Do you know in which one of these the account of the West Chicago park commissioners begins?
A. No; I couldn't say which number.

245 Mr. BARNES (to the witness): Will you step down here a moment, Mr. *Coates?*

(The witness, in compliance with the request of the assistant State's attorney, left the witness stand and went to a position by the side of the assistant State's attorney, where they could better handle and manipulate the ledgers referred to.)

Mr. BARNES: I have got them mixed up. (To Mr. Berger:) Do you know, Mr. Berger, which one it begins in?
Mr. BERGER: This one here (indicating a ledger numbered 11).
Mr. BARNES: On what page of this ledger, being ledger No. 11—"Bank Ledger No. 11, M to Z, E. S. D. & Co.," does the account, West Chicago park commissioners, begin?
A. 275.
Q. As the paper is ruled, at the head of the column, first column, is "deposits"?
A. Yes, sir.
Q. What is inserted in the book under "deposits"?
A. All deposits.
Q. To that account?
A. To that account; yes, sir.
Q. Were all the deposits in that account inserted in and under that column, under each date as they were received?
A. Yes, sir; as they were received for that account.
Q. Now, the next column at the head is "clearings." What does that indicate—the figures in that column?
A. Those are checks that come through the clearing-house to the bank on the account.
246 Q. And under "spindle," what do the figures under that indicate?
A. They were checks that were paid over the counter.

Q. Then under the head "total checks"?
A. Those are the clearings and the spindles together.
Q. Then under the head "balance"?
A. That is the balance after these were taken off and deposits added.
Q. That is the balance at the end of each day, is it?
A. At the end of each day; yes, sir.
Q. So the entire account will be shown in this ledger? It would show all that was deposited, all that was checked out that came through the clearing-house, all that went out over the counter, and the balance for each day, would it?
A. Yes, sir.
Q. And that extends to what volume?
A. Three——
Mr. BARNES: 14 is the last volume.
The WITNESS: 14; yes, sir; 11, 12, 13, and 14.
247 Q. Then the account runs through the four volumes, 11 and 12, N to Z, and 13 and 14, N to Z. Is that right?
A. Yes, sir.
Q. And it is closed on what date?
A. December 19th.
Q. What is the balance, as it appears on December 19th, to the credit of that account?
A. 316,013.40.
Q. And what is the amount with which the account begins?
A. $249,024.75.
Q. Now, look and see what is the balance of the account on November 30th, 1896.
A. You want to know the balance?
Q. Yes.
A. $368,172.98.

Mr. BARNES: Now, I offer in evidence the account as shown in the beginning, at page 275 of Ledger 11, N to Z, showing the beginning of the account to be $249,024.75 on May 13th, 1894. I purpose to offer that instead of putting in the entire account.
Judge MORAN: I lost the last statement.
Mr. BARNES: I offer this page of the ledger for the purpose of showing the beginning of the account on May 13th, 1894. Then I offer in evidence, from Bank Ledger 14, N to Z, of E. S. Dreyer & Co., the balance shown on November 30th, 1896, appearing on page 361 of such ledger, the amount being $368,172.98. Then I offer the balance of the account from that date to the closing of the account for the purpose of showing the deposits received after this, what
248 we claim is the last report, both the credits and debits of the account, what was received and what was kept out, and then the final balances that they read here.
Judge MORAN: I understood him to read it some three hundred and sixteen thousand odd dollars.
Mr. BARNES: Yes.
Judge MORAN: I don't think there is any doubt about that. The

last balance in this book shows $316,013.40. Understanding that you mean to offer that last balance, I have no objection to your offering any balance you want to.

Mr. BARNES: Then I will offer the balance on November 30th and the balance on December 19th, 1896, and read them into the record. Nov. 30th, 1896, is $368,172.98 and Dec. 30, '96, is $316,013.40. That is all at present; that is all I will offer of the account.

Judge MORAN: Hasn't the witness already stated that?

Mr. BARNES: He has.

Judge MORAN: Except the last.

Mr. BARNES: I will ask the witness, what is the balance shown at the close of the account under date of December 19th, 1896, to the credit of this account of the West park board?

A. $316,013.40.

Q. Did you not make up that account—handle the checks that were paid?

A. Yes, sir.

Q. Where did you get your items from showing the deposits to the account?

A. From the teller's cage.

Q. What form did he hand you?

A. Deposit tickets.

249 Q. Who was the teller?

A. Adolph Berger.

Q. Where did you get your checks from when you entered up debits?

A. The clearing-house checks we got from the National Bank of Illinois clearing-house; that was our clearing-house; and the counter checks from the teller.

Q. Who issued the checks drawing the money out of that account?

A. The West park board.

Q. Did you ever see any checks of the West park board?

A. Yes, sir.

Q. What is that?

A. West Park board checks.

Q. Did you ever see any checks from the West park board? Think what you are talking about.

A. Well, they were headed West park commissioners.

Q. Were they drawn by any of the West park board?

A. They were drawn by the cashier or secretary.

Q. Did you ever see any? Do you know what you are talking about? Did you ever see any checks drawn by the West park board on that account?

A. They were regular vouchers that they used over there.

Q. But who presented the vouchers?

A. The different parties that they were made payable to.

Q. Isn't it a fact that Mr. Dreyer—that they were drawn out on his order or somebody in the bank for him?

Judge MORAN: That is objected to. You have got these original ones right here.

Mr. BARNES: Where are they?

250 Judge MORAN: Have you not got the warrants?

Mr. BARNES: No; we haven't. They are all in Mr. Dreyer's possession.

Judge MORAN: The warrants drawn by the West park board, endorsed by its secretary and treasurer and countersigned by Dreeyer, are in the hands of the West park board. You have got them and they are the only things that were ever drawn against this account.

Mr. BARNES: We haven't got them and there was never any such thing introduced.

Q. Were not what was paid out there warrants on E. S. Dreyer, treasurer *by* the park board?

A. Yes, sir; and countersigned.

Q. That is what I ask you, if what was checked out of this account was not in the form of a draft on E. S. Dreyer, treasurer.

Judge MORAN: Let's have the draft produced. Everything that was drawn on the account signed by the treasurer——

251 ——: You say there is no dispute?

Judge MORAN: No dispute.

Mr. BARNES: No dispute about the balances?

Judge MORAN: No.

Mr. BARNES: Is there any dispute as to how the money was drawn out?

Judge MORAN: If you pretend they were drawn in any other way except by an order signed by the treasurer of the West park board, yes; there is a dispute.

Mr. BARNES: That order was drawn by E. S. Dreyer, treasurer.

Mr. AUSTRIAN: Not all of them.

Judge MORAN: You had every one of these orders in your control and power.

Mr. BARNES: They were all orders drawn on E. S. Dreyer, treasurer.

Judge MORAN: Not all.

Mr. BARNES: Most of them.

Judge MORAN: I think the greater portion of them; not all. I want the papers here.

Mr. BARNES: That amount there, $316,000, you figured up, does it represent the United States dollars—United States currency?

A. Yes, sir.

252 Cross-examination by Judge MORAN:

Q. Mr. Kohtz, you made up your entries in those books on the one side from checks that you received, returned checks?

A. Yes, sir.

Q. Checks that you got from somewhere?

A. Yes, sir.

Q. When you were making up you had a bundle of checks before you, didn't you?

A. Yes, sir.

Q. And you figured up those checks to make the amount of them?

A. Yes, sir.
Q. Entered in those books, and you got the item on the other side from deposit tickets?
A. Yes, sir.
Q. Now, these are the books of E. S. Dreyer & Co., aren't they (referring to books)?
A. Yes, sir.
Q. The banking-house of E. S. Dreyer & Co.?
A. Yes, sir.
Q. Those are not the books of the treasurer, E. S. Dreyer?
A. No, sir.
Q. Now, the account was kept in this form in those books, the form that you have stated to the jury?
A. Yes, sir; the account of the West park board.

Q. Now, Mr. Kohtz, I want you to give me some balances
253 on those books. Just step down and give me balances on certain dates. Take the book that will show the balance of June 30th, 1896. Have you got that?
A. Yes, sir.
Q. How much is that balance?
A. $565,525.02.
The COURT: Balance to the credit of the park commissioners?
A. Yes, sir.
Judge MORAN: Yes, sir; on that day. Turn to the one containing the balance of September 8th, 1896. How much is the balance for that day?
A. $475,525.35.
Q. Take October 19th, 1896.
A. $456,909.99.
Q. Take October 31st, 1896.
A. $440,283.78.
Q. Take November 20th, 1896.
A. $403,993.67.
Q. How much money was drawn out of that account between November 20th and December 19th by the West park board?

Mr. BARNES: If you want to go into a portion of the account between December 20th and November 19th, why not have the whole of it?
Judge MORAN: The balance shows.
Mr. BARNES: I will agree that you may make a transcript of the account from November 20th to December 19th and put it in evidence.
The WITNESS: I can't tell that, there are so many checks and items.

Mr. AUSTRIAN: All you have to do is to subtract your
254 November 20th balance from December 19th balance.
The COURT: You are asking for the amount drawn out and you are not asking for the amount put in.
Judge MORAN: The difference between the two balances.
The COURT: That would necessarily show what is drawn out because the two balances are affected by what is put in.

Judge MORAN: Simply shows the difference between the two amounts.

Mr. AUSTRIAN: Simply shows the amount drawn out over that which was put in.

The COURT: You ask him to subtract November 20th balance from December 19th balance. He may do that.

Judge MORAN: He has the other balance there.

Q. How much is it?

A. $87,980.27.

Q. You answered me a little while ago that when you made up these you made them up some time in the day, each day, didn't you? When did you make up your balance, along in the afternoon each day?

A. After banking hours.

Q. At the close of banking hours?

A. Close of banking hours.

Q. Do you know where you got the checks from to make up the balance of the West park board account?

A. I got some from the clearing-house and some over the counter.

Q. When you talk about the clearing-house, what place
255 did you get them from?

A. The National Bank of Illinois.

Q. You sent over and got the checks there to make up this book account?

A. Yes, sir.

Q. Now, the deposits you spoke of—you answered Mr. Barnes that you made up your account on the other side from deposit tickets?

A. Yes, sir.

Q. I show you here some deposit tickets. Is that what you refer to (showing witness paper)?

A. Yes, sir; those are deposit tickets.

Q. That is it?

A. Those are deposit tickets; yes, sir.

Judge MORAN: Now, I want one in as a specimen. They are all alike.

Mr. BARNES: That is not objected to. Each one specifies a certain fund.

Judge MORAN: I don't care about that.

Q. You did not keep a separate fund account in your book, did you?

A. No.

Judge MORAN: I will read a specimen in evidence, the first one I come to (reading): "Deposited with E. S. Dreyer & Company, bankers, corner Washington and Dearborn streets, for account of West Chicago park commissioners, October 24th, 1895," showing a deposit of $196.88.

I have got a batch of them, but it is not necessary to put them in.

Q. They are all of the same general form; isn't that true?
A. All of the same form.
256 Q. Differing as to date and amount, but all being deposited with E. S. Dreyer & Company by the West Chicago park commissioners?
A. Yes, sir.
Q. Did you know from your experience in Dreyer's bank whether much currency was ever kept in Dreyer's bank? Do you know as a matter of fact or did that come within the line of your particular duties?

Mr. BARNES: I object as not cross-examination.
Judge MORAN: I don't think it is strictly cross-examination, your honor, if it is objected to on that ground.
The COURT: I don't think it is cross-examination.
Judge MORAN: I withdraw the question on the ground that it is not cross-examination.
Mr. BARNES: It is agreed that in showing these balances and arguing the case to the jury we can use these books to show these balances that we have put in evidence.
Judge MORAN: You don't want to get some more convenient way to do it.

257 ADOLPH BERGER, called as a witness on behalf of the People, being first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. What is your name?
A. Adolph Berger.
Q. What is your business?
A. Book-keeper.
Q. Are you related to Robert Berger, who was the partner of E. S. Dreyer in the banking business?
A. Yes, sir; I am his brother.
Q. Were you in the employ of E. S. Dreyer & Co.?
Q. Yes, sir.
Q. Of whom was that firm composed—E. S. Dreyer & Co. composed?
A. Mr. Dreyer and my brother, Mr. Berger.
Q. How long were you in their employ?
A. Fifteen years.
Q. Were you in their employ at the time that they closed down business?
A. Yes, sir.
Q. Do you remember that?
A. Yes, sir.
Q. What date was it? Do you remember the day of the month?
A. December 21st, 1896.
Q. That was on Monday, was it?
A. Monday. In fact, they didn't open on that morning.
Q. It didn't open?

A. No; the last day was the 19th.

258 Q. The last full day of business was on the 19th?

A. Yes, sir.

Q. And it didn't open for business on Monday, December 21st?

A. No.

Q. And you were with them up to that time, were you?

A. Yes, sir.

Q. In what capacity?

A. Teller; receiving and paying teller.

Q. You are familiar, are you, with these ledgers here?

A. Yes, sir.

Q. That have been referred to?

A. Yes, sir.

Q. And with the account of the West park board that has been referred to here?

A. Yes, sir.

Q. Did you receive the deposits for that account?

A. Yes, sir.

Q. Did you know at the time that you received that account that Edward S. Dreyer was the treasurer of the West Chicago park board?

A. Yes, sir.

Q. Do you know what he did with the money that he received as treasurer?

A. I don't know that he received any myself personally.

Q. You understand, do you, that the warrant to the order of E. S. Dreyer, treasurer, and endorsed by him would be in the nature of money or funds received by him as treasurer? Do you understand that?

A. Yes, sir.

259 Q. Did you ever see any of those warrants?

A. Yes, sir.

Q. Addressed to the county treasurer, payable to the order of E. S. Dreyer, treasurer?

A. Yes, sir.

Q. Do you know what was done with those warrants?

A. They were sent to the county treasurer to get checks.

Q. Do you know what was done with the check that came back for them?

A. Yes, sir.

Q. What was done with it?

A. The check was deposited.

Q. All of the papers or checks or drafts that came to E. S. Dreyer were deposited in this account, West Chicago park board?

A. Yes, sir.

Q. Did he keep any distinct account in the bank as treasurer—in your bank, E. S. Dreyer's?

A. No.

Q. Were all the moneys that you received from the West park board—all the moneys to E. S. Dreyer, treasurer—deposited in this account?

A. Yes, sir.

Q. Now, Mr. Berger, what did you do when you received one of those checks that has been introduced in evidence, after you had deposited it to the account in your bank—after you deposited it to the account of the West Chicago park commissioners?

A. We deposited all of these with the National Bank of Illinois.

260 Q. How did they get into the books, and when, of this account in your bank, E. S. Dreyer & Co.?

A. Well, after three o'clock every day we figure up—we figure up all the deposits, checks, and all the deposits drawn out—all the accounts.

Q. I don't think you understand me. When this check was received from the county treasurer, check for $40,000, payable to the order of E. S. Dreyer, treasurer, and endorsed by E. S. Dreyer, treasurer—now, that check was brought to your bank, was it?

A. Yes, sir.

Q. Then, what minute was made in regard to that check when it was brought to your bank?

A. It was deposited to the account of the West park board.

Q. Now, how did you collect the check?

A. We deposited that, sent that with a great many other checks, usually, to the National Bank of Illinois.

Q. You weren't a member of the clearing-house, were you?

A. No.

Q. The bank of E. S. Dreyer & Co.?

A. No; we were not.

Q. So all of your checks, then, on this account and of the other accounts were sent over to the National Bank of Illinois to be collected through the clearing-house, were they?

A. Yes, sir.

Q. Here is a stamp, "E. S. Dreyer & Company paid. Pay through the Chicago clearing-house only, May 5th, 1896. To the

261 National Bank of Illinois." Who put that stamp on there?

A. Let me see.

Q. You are acquainted, I suppose, as a banker, with those stamps?

A. Well, there are two stamps on here.

Q. I just asked you about that one.

A. Which one? You didn't show me which one.

Q. This is the one I read right here (indicating).

A. This one was put on in our bank by one of the clerks.

Q. That is put on before you sent it over to the clearing-house, was it?

A. Yes, sir; as far as I remember.

Q. Before you sent it over to the National Bank of Illinois?

A. Yes, sir.

Q. Now, here is another one that I will call your attention to. That one I have just shown you is State's Exhibit 13. I will call your attention to State's Exhibit 4, on which there is the same stamp, reads the same. Did you keep that stamp in your bank?

A. Yes, sir.

Q. And before you sent it over to the National Bank of Illinois you stamped on it that, did you?

A. I don't think it was myself, but one of the clerks did it.

Q. It was done at your bank?

A. Yes, sir.

Q. That was for the purpose of getting it collected, was it?

A. It went to our account in the bank.

Q. What bank?

A. It wasn't for collection exactly—National Bank of
262 Illinois. It went to our account over there.

Q. You had an account there, did you?

A. Yes, sir.

Q. In that account you had in the National Bank of Illinois did you keep a separate account for each one of those accounts in your books or did you keep one general account in which all the moneys for the accounts in your bank went into?

A. We kept one general account——

Q. One account?

A. Some special accounts; did that.

Q. You kept one account in the National Bank of Illinois in the name of E. S. Dreyer & Company?

A. Yes, sir.

Q. And when you collected moneys like this check you credited it to the proper account in your books? You sent it over for the National Bank of Illinois to collect, and then the National Bank of Illinois kept the cash and credited it to the account of E. S. Dreyer & Co. in that bank?

A. Yes, sir; they did that right away, before it was collected.

Q. How were the moneys drawn out of that account of E. S. Dreyer in that bank?

A. By checks.

Q. Did you keep a check book?

A. Yes, sir.

Q. Look and see whether the book I show you here—whether these are the stubs of the check book used for that account from April, 1896, to December 21st, 1896.

263 A. Yes, sir.

Q. Did you keep that book?

A. Yes, sir.

Q. Did you figure up in that book the amount of deposits made each day in the National Bank of Illinois?

A. Yes, sir.

Q. Did you figure up the amount of the draft- or checks you checked out of the National Bank of Illinois?

A. Yes, sir.

Q. Does that book show the balance you had in the National Bank of Illinois to the credit of E. S. Dreyer & Co. on December 19th, 1896, when you closed business?

A. Yes, sir.

Q. How much is that amount?

A. Well, there is the amount in ink, $881.51, but there in some pencil writing below.

Q. Is that pencil writing below there yours?

A. Yes, sir.

Q. Was it made for the purpose of correcting the amount?

A. Yes, sir. There were some little items went in. They were corrected afterwards.

Q. How much was the balance as corrected by you, showing the balance of money that E. S. Dreyer & Co. had in the National Bank of Illinois when they closed business, December 19th, 1896?

A. $552.21.

The COURT: $552.21?

A. Yes; $552.21.

264 Mr. BARNES: I notice here stubs in this check book of the checks, and, for instance, take the first one in this check book, under date of May 3rd or April 3rd, 1896, for account clearings, $39,197.28. What does that represent?

A. That was the amount of the checks in the clearing-house against the bank of E. S. Dreyer & Company.

Q. Then all checks on your bank that went through the clearing-house were paid out of this account, were they, by the National Bank of Illinois, or did you give this check to them on that account so as to pay those checks?

A. Yes, sir; we gave that check to pay the checks that the National Bank of Illinois had paid for us in the clearing-house.

Q. You had an arrangement with the bank to take care of your checks in the clearing-house?

A. Yes, sir.

Q. And when those checks were paid, you would give a check to the National Bank of Illinois for the amount of checks on the bank of E. S. Dreyer that came through the clearing-house that day, and that would be deducted from the cash you had in the National Bank of Illinois?

A. Yes, sir.

Q. Now, Mr. Berger, I notice in this bank book—we will take, for instance, June 27th, 1896—these figures at the top, $117,167.22. Does that represent the balance of the preceding day?

A. Yes, sir; this balance here is transferred over to the next page.

265 Q. Then the checks that are issued that day are deducted or added, are they?

A. That is the deposits (indicating).

Q. The deposits, then, are added, are they?

A. Yes, sir. Let me correct something. This is the checking balance. This is the balance we owe to the bank (indicating).

Q. Then on June 27th, instead of having a balance in your bank of $117,167.22, you owed the National Bank of Illinois $117,167.22, did you? I mean on the morning.

A. Yes; I want to see when that begins.

Q. That is the balance of June 26th, isn't it?

A. Yes; on the evening of June 26th. That is the amount we owe to the National Bank of Illinois.

Q. In other words, you had overdrawn on your account that you had deposited in the National Bank of Illinois $117,000?

A. Yes, sir.

Q. That included all the moneys that belonged to the West Chicago park board on that date, didn't it?

A. Yes, sir.

Q. At the end of June 27th had the bank overdrawn on the National Bank of Illinois or had it money to its credit in that bank?

A. It was overdrawn.

Q. How much was it overdrawn?

A. $118,907.08.

Q. What is that?

A. That is the next day, the 29th.

Q. Well, now, what was its account the next day or June
266 30th which has been referred to; what was its account on June 30th?

A. There was a credit of $233,834.02.

Q. Do you know what moneys made up that credit in that bank?

A. I can see here the large deposits of $11,303; one of $3,000, one of $4,040, and one deposit of $354,160.

Q. Do you know what that deposit of $354,000—$354,160—was made up of?

A. Why I don't know by heart. I conclude it is one of the park vouchers, but I don't really know.

Q. Don't you remember of the sale of bonds by the West park board by E. S. Dreyer and his receiving $354,000 for the bonds of the West park board?

A. Yes; I remember——

Which question was objected to by counsel for defendant as leading.

The COURT: If he remembers it.

The WITNESS: I remember some such sale, not the exact day, and not the exact amount.

Judge MORAN: Then the money was not received by E. S. Dreyer. It went direct to the National Bank of Illinois.

The COURT: Whatever he remembers as to the sale of bonds he may testify to.

Judge MORAN: That is entirely proper, but not to lead the witness and put the words in his mouth.

Mr. BARNES: Do you remember that transaction?

A. I remember there was a large amount of bonds sold
267 about that time.

Q. Look at that book. You kept the book. State whether or not that $350,000 that was deposited there to the credit of the account of E. S. Dreyer & Co. was or was not moneys received by E. S. Dreyer, treasurer of the West Chicago park commissioners.

Which question was objected to by counsel for the defendant as leading.

The COURT: State what you remember about that.

A. As far as I remember, Mr. Dreyer never got that money. It was put directly into the National Bank of Illinois. We never saw it.

Q. You remember about it?

A. I heard of it.

Q. How did you get that?

A. I got it from the bank book.

Q. Do you know what it was made up of at the time?

A. I was told undoubtedly.

Q. Have you forgotten what that great amount of $354,000 represents?

Which question was objected to by counsel for the defendant.

Q. Have you forgotten it?

Judge MORAN: I object to the form of the question.

The COURT: I think that is a proper question, whether he has forgotten what that amount represents.

The WITNESS: When you first asked me about this amount
268 I never thought of those bonds at all.

Q. Now, do you recall it?

A. I recall it; about this time there was a bond sale.

Q. Does that amount represent the proceeds of those bonds?

Which question was objected to by counsel for the defendant.

The COURT: You can answer if you can tell. Can you tell?

A. I have been told so. I have never seen that check—the actual check—simply in a business way been told that the money has been deposited in the National Bank of Illinois by E. S. Dreyer.

Mr. BARNES: At that time?

A. About that time. I don't know the exact day.

Q. What reduced the credit in that bank on the day of the deposit of this $354,000—what reduced the credit in that bank that day to $232,916?

Which question was objected to by counsel for the defendant.

The COURT: If you remember.

Judge MORAN: That is a question for the jury. He can show what was deposited and what was drawn out.

The COURT: Exactly, and in what way, and he can state if he remembers if the account changed from one figure to the other.

Judge MORAN: Yes; but that does not permit the answer-
269 ing of that question, so much deposited and so much drawn out. Then we all can tell.

The COURT: You can answer if you can tell by what means the change in the amount of money was produced.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. It was produced by the different deposits and by the checks drawn against it; the other deposits put to it and the original balance—overdraft—all combined to make this amount.

Mr. BARNES: Was the overdraft, the amount you owed the National Bank of Illinois, deducted from this amount as made up by this $354,000?

A. Well, it wasn't exactly deducted. $354,000 was deposited on that account where the overdraft was.

Q. Was it deducted from the balance as it stood that day after you had deposited the $354,000?

A. Well, it was with others.

Q. Oh, yes; with others; but you figured it, didn't you?

A. Yes.

Q. Well, now, how did you get that balance of $232,000 that day? Did you get it by deducting, among other things, the overdraft of E. S. Dreyer & Co. on the National Bank of Illinois?

Which question was objected to by counsel for defendant as leading.

270 The COURT: Tell how you got it.

A. The account started with the overdraft on that day and I added all the checks drawn on that day and I deducted all the deposits—let me see—I added all the checks drawn on that day, and this was deducted from all the deposits on that day. That would give this balance.

Mr. BARNES: Was the overdraft paid out of that money?

A. Yes, sir.

Q. What was the balance the next day—July 1st?

Judge MORAN: Balance where?

Mr. BARNES: Balance in the National Bank of Illinois to the credit of E. S. Dreyer & Company's account.

A. July 1st started with a balance of $233,854.02.

Q. That is the beginning of the day?

A. That is the beginning of the day.

Q. Now, what was the end of the day?

A. It was $59,605.35.

Q. Among the items deducted to bring down that balance I see $150,000. Do you know what that item was?

A. It was a check payable to the National Bank of Illinois.

Q. What for?

A. I haven't written this. This isn't in my writing—lot of marks there.

Q. Was it to pay a debt due the National Bank of Illinois?

A. It was given to the National Bank of Illinois. I did not write that check myself.

271 Judge MORAN: Mr. Barnes, I wish you wouldn't lead the witness.

The COURT: Do you know what that check was given for?

A. It was given to the National Bank of Illinois.

Q. For what; do you know that?

A. Most likely for notes—I am not sure—for notes that Dreyer & Company owed, but that is not——

Q. You don't know that?

A. I don't exactly know.

Q. As book-keeper of E. S. Dreyer & Company, it didn't come to your knowledge exactly what that check was for, as I understand you?

A. No, sir.

Mr. BARNES: Did you at that time—do you know whether or not, or did you keep any account on your books of the indebtedness of E. S. Dreyer & Co. to the National Bank of Illinois?

A. The book-keeper did in a general ledger account.

Q. With the National Bank of Illinois?

A. No; called "bills payable."

Q. Bills payable?

A. But there were other accounts that included, amongst others, the National Bank of Illinois.

Q. Who has that book now—the receiver?

A. I suppose so. I have never seen it since.

Q. Who kept that book?

A. The book-keeper, Mr. Mason—W. J. Mason.

Q. What was the balance of the bank on July 22nd?

272 A. 22nd?

Q. July 22nd.

A. The account was overdrawn $2,253.07.

Q. How much was it overdrawn the next day?

A. $25,738.62.

Q. How much on the 24th?

A. $38,771.74.

Q. How long did the account remain overdrawn in the National Bank of Illinois?

A. After that day?

Q. Yes.

Which question was objected to by counsel for the defendant.

Mr. BARNES: I shall follow it up by showing that they had a lot of moneys on account of the West park board. I will show a lot of money went into that account, and he did not have then, and that he was owing after that time to the West park board thousands of dollars and didn't have a cent to pay it.

Judge MORAN: I ask that all this testimony be stricken out.

Mr. BARNES: Then I will follow it up to December 19th.

Judge MORAN: That doesn't make any difference. We must confine the proof to this indictment. Suppose Dreyer & Co. did not have in their bank at any time funds of the West park board. That is not this case. This is for not paying over money to his successor in his hands as treasurer at the time it was demanded from him.

The COURT: Well, Judge Moran, I am inclined to think
273 that that view of the case is probably correct, but you have in your opening argument insisted that Mr. Dreyer deposited these moneys with the National Bank of Illinois, a corporation in

excellent financial standing, and that somehow by the failure of the National Bank of Illinois he was prevented from paying this money.

Judge MORAN: Exactly.

The COURT: Under that contention I think it is proper to show that really he had no such sum as $318,000, but only had about $500 to his credit in the National Bank of Illinois.

Judge MORAN: Does that show that E. S. Dreyer & Co. drawing funds out of the National Bank of Illinois was E. S. Dreyer, treasurer, drawing it out?

The COURT: Not exactly; but as I understand and as I have understood your contention it is that the account which Dreyer had, if any, in the National Bank of Illinois, was the account of E. S. Dreyer & Company. You stated that the bank of E. S. Dreyer & Company never kept any considerable amount of money on hand, only a few thousand dollars, but continued to make use of the National Bank of Illinois to transact its affairs through the clearing-house, and you haven't contended so far as I heard you that E. S. Dreyer himself personally had a dollar in the National Bank of Illinois.

274 Judge MORAN: I stated and I will prove and have already on cross-examination proved that all the checks, drafts, and everything else that came to E. S. Dreyer as treasurer went direct to the National Bank of Illinois; that there the money was and there it was kept. Now they are attempting to show that some time during the progress of an account there was no money to the credit of E. S. Dreyer & Company in the National Bank of Illinois. What issue does that tend to prove in this case? What issue in this indictment does that tend to prove?

The COURT: Standing by itself alone, because if you come right down to it the only question is what funds this defendant had in his hands of the West park board which he did not turn over when the demand was made upon him, but in order to get at that we have to go through a great many accounts showing moneys that went into his hands as treasurer of the West park commissioners.

Judge MORAN: There is no disagreement between us. We admit $316,000 in the account against him due to the West park board at the time of this failure. There is no necessity for going through this proceeding. It is a mere parade before the jury.

The COURT: At the time of the demand?

Judge MORAN: Yes; and at the time of the failure, too—non-essential matter.

The COURT: I do not really understand what your defense
275 then is.

Judge MORAN: If your honor please, you will see what my defense is.

The COURT: I have heard you make a statement to the jury and I have the right to suppose that you stated to the jury what your real defense is.

Judge MORAN: I propose to prove my defense to the jury. I do not propose to have the State go into an immaterial matter before

the jury. I will show they deposited this money in the National Bank of Illinois and it never came out of there as far as Dreyer is concerned.

Mr. BARNES: Let me show another reason why I have offered this evidence. Counsel has contended right along that every one of these checks went into the National Bank of Illinois. He has asked every witness to look at the check and see if it wasn't payable to the National Bank of Illinois. He has made his argument to the jury that the National Bank of Illinois got the money, and then he asks for the balances on these books showing on June 30th to the credit of the West park board $505,000. He objects to my showing on June 30th where the money was and how much money they had on hand. He deems it pertinent for him to show that they were holding these moneys. Now, I claim that either his evidence is irrelevant entirely or else if it is relevant then we have a right to show, when he assigned the amounts of money to the credit of the
276 West park board, what became of them. He has stated to the jury that this man held millions of money, which we agree to, and expended millions, but there was a little balance of $316,000 lost, as he claims, by the National Bank of Illinois. Now, I purpose to show, and I think it should come in on the main case, as it has been brought out on cross-examination—I can show whether the moneys that were actually received and went to the credit of this West park board—whether those moneys were actually drawn out.

The COURT: Judge Moran, do you contend that the account of E. S. Dreyer & Co. with the National Bank of Illinois has nothing to do with this transaction? I would like to know it, in this case.

Judge MORAN: I contend this: I contend that this case is to be tried like any other case; that the State will make its case under its allegations in the indictment, and that I will cross-examine these witnesses so far as the cross-examination is competent. Then I get my case, and I will make proof of my case as best *as* I can make it. I object to any other course in this case than what would be pursued in any other criminal case. The State makes out its indictment. I meet it if I can. I don't go back of my statement to the jury. My contention is that every dollar of this money that came from the West park board went into the National Bank of Illinois ear-marked as the money of the West park board, every dollars
277 of it. I deny that anybody can draw it out nor any partnership affect it at all.

Mr. BARNES: Judge, to make it short, I will withdraw this evidence that you object to. I understand that you don't object to our proving what was the balance in the National Bank of Illinois on December 19th.

Judge MORAN: You have already proven it.

Mr. BARNES: What you object to is how the balances—not how the balances drew, but what caused the balances to decrease in the National Bank of Illinois on and after June 30th, which I put in evidence, and the evidence in regard to the overdraft.

Judge MORAN: I object to this question which you asked.

(Question read.)

Mr. BARNES: I withdraw the question.

Q. Did you keep a check book? Did you keep a deposit book in your account with the National Bank of Illinois?
A. Yes; we had a regular bank book.
Q. And this is the bank book, is it (indicating)?
A. Yes, sir.
Q. And does that show—is it balanced up to December 19th?
A. Yes, sir.
Q. That balance corresponds with your figures here in the check book, does it?
A. Yes, sir.

278 Q. Now, Mr. Berger, can you tell the amount of cash that was in the bank of E. S. Dreyer & Co. outside of this $562 that you had in the National Bank of Illinois when you closed business December 19th—the amount of cash you handed over to the receiver?
A. They are split up into checks, five and ten dollars, one and two dollar bills, gold and silver.
Q. I mean how much you handed over in currency to the receiver?

The COURT: How much you had on hand?
Mr. BARNES: Yes; how much you had on hand.

A. The total balance was $8,845.59.
Q. That included some checks, didn't it?
A. Yes, sir; that included checks that went to the clearing-house and everything.
Q. Haven't you figured it up on this side?
A. This was made later, December 24th. That is later, for the receiver of the Illinois Trust & Savings bank. I handed over to the receiver in currency and checks $5,850.77. That was currency.
Q. That was all currency?
A. Yes, sir; and there was $2,357.32 in checks.
Q. These were checks that were deposited in the bank to different accounts which were not collected when you closed?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. Then the amount in cash you really had at the close of business December 19th was——

279 A. $5,850.77.

Q. Did you make out this report that has been handed here (showing witness paper)?
A. Yes, sir.
Q. Did you send it to the secretary of the West park board?
A. I usually handed it to Mr. Talty or to one of those men.
Q. Did you deliver that one?
A. Yes, sir.

Mr. BARNES: I now offer it in evidence, and said statement is to be found on page 218 of the bill of exceptions.

Which offer was objected to by counsel for the defendant.

The COURT: I don't see any objection to it.

Judge MORAN: It is put in here to bind Dreyer.

The COURT: I understand this man was in the employ of Mr. Dreyer?

Judge MORAN: Yes; he was an employé of the firm of E. S. Dreyer & Company.

The COURT: Of which firm Mr. Dreyer was the senior member.

Judge MORAN: He was not an employé of E. S. Dreyer, treasurer.

Mr. BARNES: Did you put "E. S. Dreyer, treasurer," on there?

A. Yes, sir.

Q. What did you put it on there for? Did that report, on which you put there——

Judge MORAN: Counsel has the most extraordinary way of
280 evading the rule of the court and the rule of evidence. He offers a paper and then he asks, "Didn't you put this on the paper?" The question is whether the paper is admissible.

Mr. BARNES: You object to it. For that reason I am following it up to show——

Judge MORAN: Has your honor admitted it?

The COURT: Yes; I think it is admissible.

To which ruling of the court the defendant, by *its* counsel, then and there duly excepted.

(The said paper, marked Defendant's Exhibit J, is in words and figures as found on page 217 of this bill of exceptions.)

281 Mr. BARNES: You have seen these checks, have you, Mr. Berger, here of the county treasurer that have been introduced in evidence, payable to the order of E. S. Dreyer, treasurer?

A. I have seen them some time ago.

Q. You have seen also the warrants that have been introduced in evidence here?

A. Yes, sir.

Q. For which those checks were given?

A. I identified them once.

Q. Drawn on E. S. Dreyer, treasurer?

A. Yes, sir.

Q. Did you ever take any of those warrants or checks to Mr. Dreyer to get his signature?

A. I may have done it. I don't remember a special case.

Q. Do you know whether Mr. Dreyer knew, was aware of the fact, that these checks payable to him as treasurer were deposited in this account with the West Chicago park board?

Which question was objected to by counsel for the defendant.

The COURT: What conversation did you have with Mr. Dreyer concerning those checks in any way or the account they should be placed to?

A. I don't remember how the account originally was started, and afterwards we never had a conversation about it, but it might have been when it was first opened, the account, 6 or 7 years ago.

282 Q. Look at page 275, Ledger 11, N to Z. You see where the account begins?

A. Yes, sir.

Q. Now look at State's Exhibit O, being a draft by the West park board on its treasurer, F. M. Blount, payable to the order of E. S. Dreyer, treasurer, for the same sum as that, and state whether or not that is the check which began that account.

A. Well, this check, this order, was sent to the county treasurer, and a check for this started the account, as far as I know.

Q. A check for that started the account?

A. Yes. This was sent to the treasurer.

Q. You misapprehended the question. This is a draft on Blount, former treasurer of the West park board, payable to E. S. Dreyer, treasurer, for the sum of $249,024.75, the same amount as starts this account. Now, I will ask you if that is not the item that started this account.

A. Yes, sir.

Q. Now look at this item for $35,000 and tell if that went into the account and where. That is State's Exhibit P.

A. This is dated May 5th, 1894, but it is not in the account on May 5th, 1894. It may be a day afterwards.

Q. Well, is it in the account?

A. That must have been part of the other deposits. It

283 doesn't show in the account alone—this $35,000.

Q. Does it go into that account?

A. There must be a deposit where it is part of it.

Q. Did you ever know of anything going into the account of the West Chicago park board that wasn't deposited there for Mr. E. S. Dreyer as treasurer of that park board?

A. Well, I never knew enough about that matter. It was simply deposited on that account.

Q. Had you ever heard that Mr. Dreyer in all these years from 1884 to 1896 was treasurer of the West park board?

A. I knew it.

Q. Had you seen all this time these checks coming in to E. S. Dreyer, treasurer?

A. Yes, sir.

Q. And had you deposited as teller everything—signed the slips and deposited those amounts to the account of the West park board?

A. Yes, sir.

Q. Did you know whether or not that was the account kept by E. S. Dreyer, treasurer of the West park board?

A. Why, it was kept by the West park board.

Q. Did you know that that was the account of Mr. Dreyer as treasurer for the West park board?

A. That was the account of the West park board.

Q. Answer the question. Did you know that that was the account of E. S. Dreyer as treasurer of the West park board?

Which question was objected to by counsel for the defendant.

284 A. I can't make a distinction. I don't know it, you know.

Judge MORAN: It already appears from the slips shown to the book-keeper that it was the West park board account with E. S. Dreyer & Company. These books are the books of E. S. Dreyer & Company. The account in these books is the account of the West park board in account with E. S. Dreyer & Company. It has been shown that orders and drafts on the county treasurer and checks given by the county treasurer were deposited in the National Bank of Illinois, and that E. S. Dreyer & Company got credit for them on the account.

The COURT: I think the question of Mr. Barnes is whether he knows of any other account kept—of any other account kept by E. S. Dreyer as treasurer with the West park commissioners.

The WITNESS: There was another account.

Mr. BARNES: Where was it?

A. Mr. Dreyer kept an account with the National Bank of Illinois.

Q. Did you know about that?

A. Yes, sir.

Q. And did you know that he transferred all the moneys of that account into the account of E. S. Dreyer & Company?

Which question was objected to by counsel for the defendant.

Q. Did you know that?

Which question was objected to by counsel for the defendant.

285 Q. What did you know as to that?

A. There was an account at first in the National Bank of Illinois with E. S. Dreyer, treasurer.

Q. What became of that account?

Which question was objected to by counsel for the defendant on the grounds that the books will show.

The COURT: If he knows he may state.

The defendant, by his counsel, then and there accepted to the ruling of the court.

Mr. BARNES: Let us see if he knows of his own knowledge whether or not one was kept there.

Q. Do you know that there was an account kept in the National Bank of Illinois by E. S. Dreyer, treasurer?

A. Yes, sir; I know it.

Q. Do you know how long that account was kept?

A. Not the exact time, but as far as I remember seven or eight or nine months.

Q. Do you know what became of the moneys in that account?

Judge MORAN: Of your own knowledge.

A. It was drawn out.

Q. Did you know the account ceased to exist?

A. After all was drawn out it stopped itself.

Q. Then the only account you know of that was distinctly kept with E. S. Dreyer as treasurer only lasted 7 or 8 months?

A. I think about 7 or 8 months.

Q. Did you ever know of any period after that of his keeping an account as E. S. Dreyer, treasurer?

Judge MORAN: That is objected to. The question is leading and the manner is insolent to the witness, who is ready to testify to any fact that he knows. You are treating him like an unwilling witness.

286

The COURT: I don't see that the question is leading. I don't see what other form you can put it in. He is asked if he knows of any other account kept by E. S. Dreyer in that bank.

Judge MORAN: The books will show.

The COURT: We are not called upon to go through all the books of the bank. The question is whether he knows of any other account in the name of E. S. Dreyer, treasurer of the West park commissioners.

(Question read.)

Which objection was overruled by the court; to which ruling of the court the defendant, by *its* counsel, then and there duly excepted.

A. I don't know of any other.

Mr. BARNES: Do you know whether or not the moneys which went into that account of E. S. Dreyer, treasurer, kept for that 7 or 8 months in the National Bank of Illinois also went into this account here of the West park board of commissioners? Do you know that?

Judge MORAN: Do you know of your own knowledge?

A. The books will show. I don't remember.

Mr. BARNES: I didn't ask you what the books would show.

287

I am asking you what you know.

A. No; I don't know.

Q. Do you know when that account began?

A. It began the first day when Mr. Dreyer was treasurer, if I remember right.

Q. Was that Tuesday?

A. I don't really remember that.

Q. On page 275.

A. It began on the day after Mr. Dreyer got the first money.

Judge MORAN: What is the date?

A. On the 14th of April.

The COURT: April of what year?

A. 1894.

Mr. BARNES: And that is the day after Mr. Dreyer got the first money as treasurer of the West park board?

A. Yes, sir.

Q. And they were credited to the account of the West park board, were they?

A. On the first day the whole amount was credited to the West park board.

Q. Was there any money received of the money of E. S. Dreyer, treasurer, either in the form of draft or currency or warrants after that time, which was not entered by you or under your direction in this account?

Judge MORAN: Received by whom?

Mr. BARNES: Received by E. S. Dreyer, treasurer.

Judge MORAN: Do you know that?

The COURT: He may answer that. Do you know any
288 funds of any nature were received by E. S. Dreyer, treasurer, subsequent to the opening of that account that were not entered in that account?

A. I don't know; I don't remember just at present.

Q. Do you not know that the very moneys included in the account of E. S. Dreyer, treasurer, in the National Bank of Illinois were all entered in this account of the West Chicago park commissioners?

Which question was objected to by counsel for the defendant as leading, the question being what moneys went into that account.

The COURT: Do you know whether the moneys which went into this account, which, you say, lasted some seven months as E. S. Dreyer, treasurer, also went into this account of the West Park commissioners?

A. I don't know if all the moneys went into this account. I am inclined to think it did not.

Mr. BARNES: What do you know about that account over there?

A. I have seen that other book—that treasurer book—and there were quite a few deposits in there.

Q. How were the accounts checked out of this—how were the moneys to the credit of this West park board checked out?

A. By checks and vouchers and drafts, coupons and bonds.

Q. By what checks?

A. From the West park board.

Q. Checks on whom?

289 A. Most of the vouchers and checks were directed on E. S. Dreyer, treasurer.

Q. Did you pay them out?

A. Yes, sir.

Q. Why did you pay out checks on E. S. Dreyer, treasurer, of the account of the West park board?

Which question was objected to by counsel for the defendant.

Mr. BARNES: This witness has shown himself to be an unwilling witness, evading any knowledge of the treasurer's account. I will show that he does know.

Judge MORAN: This is a pure play. Did I not state to the jury in my opening that Dreyer's account was kept in this form?

Mr. BARNES: Why do you object to it?

Judge MORAN: Because you are making a parade and trying to make out that you can't get your evidence in this case.

The COURT: Do you admit that the account which E. S. Dreyer kept with the West park commissioners was kept in the books of E. S. Dreyer & Company as the account of the West park commissioners?

Judge MORAN: I admit this and never denied it; stated it in my opening statement that the money that came to the West park board the West park board deposited to its account in the bank of E. S. Dreyer & Company, and that checks made to E. S. Dreyer, treasurer, were endorsed and put to that account. That is the exact fact and I don't dispute it.

290 The COURT: Endorsed and put to that account by whom?

Judge MORAN: That is to be shown. I think where they were in Dreyer's hands and endorsed by him and put in there it would be pretty manifest to whose account it was. I am not obliged to draw inferences now and I think the inference is for the jury. The exact fact is all I want.

The COURT: There seems to be a confusion whether this account is the account of Dreyer as treasurer. It is an account kept in his bank by his employés. The question is whether this account——

Judge MORAN: I think that account contains every dollar that is to be charged against Dreyer as treasurer.

Mr. BARNES: Do you admit that?

Judge MORAN: I never have disputed it.

Mr. BARNES: Do you admit it?

Judge MORAN: I am not making admissions. You prove what the facts are by legitimate evidence.

The COURT: Let him answer the question.

(Question read.)

To which ruling of the court the defendant, by *its* counsel, then and there duly excepted.

A. I made no distinction whatever; deposited checks first this way and the other, and the bank made not the slightest distinction. It was all the same to us. The deposit checks were usually made to the West park board to Dreyer & Company, and the drafts were usually made the other way.

291 Q. Drafts how?

A. To Dreyer, treasurer. We in the bank made not the slightest distinction. They all went to the same place. There is no distinction whatever.

Mr. BARNES: Did you ever know of a draft being drawn directly on that account by the West park board—a draft or check—did you ever know of one?

A. I don't know of a check. I know of those letters——

Q. You know of things outside of what I am asking you?

Judge MORAN: I object to the question. I object to the whole performance, if your honor please. I tried to show how the papers were drawn. What is the State's attorney trying to make out?

Mr. BARNES: I am trying to make out the facts. I am claiming that no letters are drafts or checks, and I claim that you know the facts as well as I do, and I am going to get the facts out of this witness if it takes me from now till next Christmas.

The COURT: The question is, Did you ever know of any drafts that were other than on Dreyer, as treasurer, made by the West park commissioners—being placed to any other account than that?

Judge MORAN: Your honor means technically drafts?

The COURT: Yes, note—that I will include—or check.

Judge MORAN: Orders to pay money?

The COURT: Checks or drafts.

The WITNESS: I don't know of any checks or drafts in the
292 bank since—regular bank checks or so.

Mr. BARNES: That is an answer to the question I asked you. I think that is practically all that I want to ask this witness. If there are any questions it would*n't* be only 3 or 4 little matters that I have overlooked.

Adjourned until Friday, February 23rd, 1900, at 10.00 a. m.

293 FRIDAY, *February 23rd*, 1900—10 a. m.

Court met pursuant to adjournment.

Whereupon F. J. THREEDY, a witness called on behalf of the People, having been first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. What is your name?
A. Fred J. Threedy.
Q. What is your business?
A. Deputy clerk of the circuit court.
Q. How long have you been such?
A. About 12 months.
Q. Do you know the handwriting of Judge Richard S. Tuthill?
A. I do.
Q. Look at the signature of R. S. Tuthill, judge of the circuit court, on "State's Exhibit N," and state in whose handwriting it is (handing witness paper).
A. Judge Tuthill's handwriting.
Q. Judge of the circuit court of Cook county?
A. Judge of the circuit court of Cook county.
Q. Look at this book that I now hand to you. What book is that (handing witness book)?
A. That is chancery record of judges in banc—chancery record of the circuit court of Cook county.
Q. Is that the record in which all the orders in banc are
294 entered?
A. Yes, sir; it is.
Q. Kept for that purpose?
A. Kept for that purpose.
Q. And that alone?
A. Yes, sir; this alone.

Mr. BARNES: I offer in evidence page 88 of that record.

Judge MORAN: Well, I object to it, your honor. It has no pertinency. It is simply a copy of this bond—a copy of the bond which counsel for the State have offered in evidence.

The COURT: Let's see it.

(The page was shown to the court.)

Judge MORAN: An exact copy of it from beginning to end. There is no convening order, and no order of any kind—no order whatever of any kind.

The COURT: I think it is admissible on account of this being the record of the court and containing this entry: "Approved this 21st day of December, '96. R. S. Tuthill, judge of the circuit court."

Judge MORAN: That's on the bond.

The COURT: I understand it, but then I think they may offer the record also, if a record was made of it. I see no reason why they may not offer that also. I know that is on the bond also, but I see no reason why they may not offer the record.

Judge MORAN: It is not an order. There is no convening order of the court at all. Look on the next page and you will see.

295 The COURT: I had at one time an impression that a convening order was necessary, but a case went up to the supreme court when I was in the appellate court in which it was very essential to determine the point in the case, whether an order was made in the January term or the February term. There was nothing whatever of a convening order, nothing of the kind, and the order was made in such a way—you are familiar with it—that whether it was January 31st or February 5th, for instance, it was utterly impossible to tell, and the supreme court affirmed the proceeding.

Judge MORAN: I know they have expressly decided in other cases and reversed them, a great number, because there was no convening order.

The COURT: I understand. I think there should be, but after that decision I thought——

Judge MORAN: Well, there is another objection. There is no such thing as the court in banc. This is said to be a record of the court in banc. We don't know any*thing* such thing as the court in banc.

Mr. BARNES: It is a record of the circuit court sitting in banc.

Judge MORAN: It cannot sit in banc. We don't know any such condition of things. It is wholly unknown to our system of things.

The COURT: They do sometimes. There are certain things they do as a body.

Judge MORAN: The principal objection is that it is imma-

296 terial, simply loading up the record here with something which is an exact copy, to the dotting of the "i" and the crossing of the "t," of what counsel has got in evidence.

The COURT: It shows that the court met for the purpose of having a record made of its action.

Judge MORAN: The trouble is it don't show that. It shows that the clerk copied a bond into the record book of the court. It does not show any order of the court that it should be so copied.

Mr. BARNES: It is a record of the court.

The COURT: It is a record of the court.

Judge MORAN: It is a record book kept by the clerk, in which he writes something. If he wrote a love letter in that it would be no record.

The COURT: I have known letters to get into the record of the court.

Judge MORAN: Yes, sir; in a proper way; but if he should take somebody's love letter and copy it in there without having some order of the court to copy it in, it wouldn't be competent. The point is it is immaterial.

The COURT: I will admit it.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES: I will read it into the record. I will read from page 88 of the chancery record of the judges in banc, volume 134 of the circuit court of Cook county, "Bond of Fred M.
297 Blount," and then follows——

Judge MORAN: Copy of bond.

Mr. BARNES: Copy bond of Fred M. Blount, and then it follows verbatim as it appears in "State's Exhibit N," hereinbefore set forth. (To Judge Moran:) That's all right, is it?

Judge MORAN: I think that makes a copy of it.

298 Mr. BARNES: I offer in evidence on pages 69 and 70 an order of the circuit court approving the bond of Edward S. Dreyer, being the bond marked "State's Exhibit L," being the bond given by Dreyer in '96.

Judge MORAN: I have no objection to this, because it is right. Here is a regular convening order—everything recited—the order of record approving the bond, and I am willing it should go in as illustrating the difference between it and the other bond.

Mr. BARNES: Do you want me to read it into the record?

Judge MORAN: No, sir.

Mr. BARNES: You will admit it is a regularly entered order?

Judge MORAN: Yes, sir; that it is a regular entered order, and consent that it is as read, and either one can refer to it at large, and if necessary we can put a copy of it as it is in this book in the record.

Mr. BARNES: All right. It appears on pages 69 and 70 of that record.

Which said order and bond on pages 69 and 70 *is* in the words and figures as follows, to wit:

299 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before the Honorable Murray F. Tuley, chief justice of the circuit court, Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 17th day) of February, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

Present: Honorable Murray F. Tuley, chief justice of the circuit court of Cook county, State of Illinois; Jacob S. Kern, State's attorney; James Pease, sheriff.

Attest: FRANK T. GUALTER, *Clerk.*

Monday, February 17th, A. D. 1896, February Term. In Chancery.

Order Approving Bond of Edward S. Dreyer, Treasurer of West Chicago Park Commissioners.

Whereas the West Chicago park commissioners, in pursuance of an act entitled "An act to authorize corporate authorities of towns to issue bonds for the completion and improvement of public parks and boulevards, and to provide a tax for the payment of the same," approved and in force June 21st, A. D. 1895, has duly elected Edward S. Dreyer treasurer for the term of one year from the 30th day of December, A. D. 1895, and until his successor shall have been duly elected and qualified; and

300 Whereas said Edward S. Dreyer, as principal, and George Schneider, Hempstead Washburne, and Philip Henrici, as sureties, have executed a bond in the sum of five hundred thousand ($500,000) dollars, upon the condition that said Edward S. Dreyer shall faithfully perform the duties of such treasurer of said West Chicago park commissioners during his term of office, and shall at the expiration of his term pay over to his successor all moneys, properties, books, and papers belonging to said office:

Now, therefore, it is ordered that said bond of said Edward S. Dreyer, as principal, and George Schneider, Hempstead Washburne, and Philip Henrici, as sureties, be, and the same is hereby, approved this 17th day of February, A. D. 1896, and that the said bond be ordered spread of record.

C. & W.

301 *Bond.*

Know all men by these presents that we, Edward S. Dreyer, as principal, and George Schneider, Hempstead Washburne, and Philip Henrici, as sureties, of the city of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto the West Chicago Park Commissioners of Chicago, in the county of Cook, State afore-

said, in the sum of five hundred thousand ($500,000) dollars, good and lawful money of the United States; for the payment of which sum, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this thirtieth day of January, A. D. 1896.

The condition of this obligation is such that whereas the above-bounden Edward S. Dreyer was, on the thirtieth day of December, A. D. 1895, duly elected to the office of treasurer of the West Chicago park commissioners for the year ending December thirtieth (30th), 1896, and until his successor shall have been duly elected and qualified, and is about to assume the duties of said office: Now if the said Edward S. Dreyer shall well and truly perform the duties of said office of treasurer during his term of office and shall safely keep and truly account for all moneys, goods and chattels, and other things coming to his hands as such treasurer during his term of office, and at the expiration of his term of office shall pay over to his successor in office, or to any other person duly authorized by said West Chicago park commissioners to receive the same, all moneys, goods and chattels, and other things received by him as such treasurer and not otherwise lawfully paid out, and shall deliver to his successor in office, or other person appointed to receive the
302 same, all property, books, papers, and other things in his hands belonging to said office, and shall at the expiration of his term of office, or oftener if thereunto requested by the said West Chicago park commissioners, render a just and true account of his doings as such treasurer, then this obligation to be void; otherwise to remain in full force, effect, and virtue.

EDWARD S. DREYER. [SEAL.]
GEORGE SCHNEIDER. [SEAL.]
HEMPSTEAD WASHBURNE. [SEAL.]
PHILIP HENRICI. [SEAL.]

Approved this 6th day of February, A. D. 1896.
M. F. TULEY,
Judge Circ't Ct., Cook C'ty, Ills.

303 ADOLF BERGER was recalled on behalf of the State and testified as follows:

Direct examination resumed by Mr. BARNES:

Q. Mr. Berger, look at this check which I hand you, dated June 19th, 1894, signed by Harry Wilkinson, secretary (handing witness paper). Can you state whether that check was paid at the bank of E. S. Dreyer & Co.?

Judge MORAN: Let me see it.

Mr. BARNES: All right, show it to the judge.

(The paper was handed to Judge Moran, who returned it to the witness.)

A. It was paid in the clearing-house by the National Bank of Illinois, and afterwards redeemed by E. S. Dreyer & Co. from the National Bank of Illinois.

Q. It took the same course then as all other checks drawn on the bank of E. S. Dreyer & Co.?

A. All except those——

Objected to by counsel for defendant.

Q. Where they were not paid over the counter? Do you mean that?

A. Yes, sir.

Q. Such as you explained yesterday?

A. Yes, sir.

Q. Now, whose signature is that on the edge there?

A. E. S. Dreyer, treasurer.

Q. Out of what account was that paid in the books?

304 A. Paid out of the account of the West park board.

Mr. BARNES: I will offer it in evidence.

Judge MORAN: It is attached to something.

Mr. BARNES: I take it—I don't know as I am correct or not—these vouchers were attached after the check went back to the West park board. Those vouchers did not follow it; did they follow the check through?

A. As a rule, after the month was over, they would send us vouchers for all checks that had been paid, for everything that had been paid, afterwards, after we sent a statement.

Mr. BARNES: The check offered in evidence we will mark "State's Exhibit Q."

The check offered is in words and figures as follows, to wit:

$20.00. No. 15466.

CHICAGO, *June* 19, 1894.

Treasurer West Chicago park commissioners,

Pay to the order of Chicago Title and Trust Co. twenty and $\frac{00}{100}$ dollars.

GEO. F. TALTY, *Secretary.*

Countersigned:
CARL MOLL,
Act. Auditor.

[On the margin:] This warrant payable at E. S. Dreyer & Co.'s bank. Edward S. Dreyer, treasurer.

[Stamped across the face in red ink:] E. S. Dreyer & Co. bankers. Paid June 19, 1894.

305 Q. Is that the form of checks that were drawn on the account of the West park board in your bank (referring to Exhibit "Q," just offered)?

A. Yes, sir.

Q. Were there any other checks than checks in that form drawn upon the account of the West Chicago park board?

A. I don't know of any other; I don't remember any other now.

Q. When in the course of business did Mr. Dreyer put his name on those checks at the corner there, as that one is placed on, "E. S. Dreyer, treasurer."

Judge MORAN: Do you mean whether before or after it went through the clearing-house?

Mr. BARNES: Yes, sir; I don't know when he put it on.

The WITNESS: I don't know; I couldn't tell. I couldn't tell now. It wasn't always signed. Some were signed and some were not——

Q. What is it?

A. It may have been signed before or after; I don't know.

Q. Did you pay those checks out of that account without Mr. Dreyer's signature on there?

A. I think we did.

Q. Was that a practice recognized by Mr. Dreyer?

Judge MORAN: I object. Whatever Dreyer said about it or *whether* he did about it is competent.

The COURT: Yes, sir.

Mr. BARNES: I will ask you this question. I will withdraw that other question.

306 Q. Was Mr. Dreyer in the bank during the bank hours?

A. Not always.

Q. Was he ever there?

A. Yes, sir.

Q. Well, did he have an office anywhere else than in the bank?

A. No; he had no office, so far as I know.

Q. Didn't he have his business office right in the bank all the time you were doing a banking business?

A. His business office was there.

Q. Was he conversant with the banking affairs there, the way the business was run?

A. Yes, sir.

Q. Took part in it, did he?

A. Yes, sir.

Q. And you are unable to tell when he placed his signature on those drafts?

A. As far as I remember, sometimes they were signed before they were paid, but very often they were signed after, when we made up the statement at the end of the month, and I think in a great many cases they were not signed at all.

Q. What did you do with those drafts after they were paid?

A. Cancelled them and put them in a box marked "West park board."

Q. What did you do with them after that?

A. At the end of the month I made a statement from those checks and the deposits; returned them to the West park.

Q. Was it from such drafts and the deposits that you made up the report shown you yesterday?

A. Yes, sir; such and others. There was a great many different items.

307 Q. Now, there are some vouchers that are attached to that check; did you ever see those vouchers—the bank officers—you or any of the bank officers see those vouchers?

A. I did.

Q. When did you see those vouchers? Those are the vouchers for which the check—representing the account for which the check was given, were they not?

A. Yes, sir.

Q. When did you first see those vouchers?

A. I saw them after we had returned the checks and all other charges to the park. They would send us those vouchers.

Q. Who sent you those vouchers?

A. The park commissioners.

Q. When would they send you the vouchers?

A. A day or two after we had returned the checks and the statement.

Q. After you had returned the checks?

A. As far as I remember.

Q. Were the vouchers attached to the check-, do you know?

A. No; I think not. I think the checks were in the park office over there. I am not quite sure on that subject.

Q. What became of the vouchers after they were sent to you? Were they returned back to the board?

A. Yes, sir; they were signed, if I remember right, and returned.

Q. What was the object of sending the vouchers to the bank—for what purpose were they sent to the bank?

308 A. I supposed to be signed. I don't remember well. This is not signed at all (referring to the paper in his hand). I thought they were signed. I am not quite positive on that whole subject, it is so long ago.

Judge MORAN: Do you claim that they were sent?

Mr. BARNES: I don't know. I didn't know it. I was rather surprised to find that they went to the bank with the vouchers.

The WITNESS: We got vouchers sometimes.

Mr. BARNES: I should say the vouchers were attached at the commissioners' office after the check was returned to the commissioners' office. I don't want him to state anything he don't know. I can ask Kennedy.

Q. Well, you don't know when those vouchers were attached to the checks—whether they were attached by the West park board or by the bank or the bank's officer?

A. I don't remember, but at any rate we had the vouchers at one time in the bank; whether before or after I don't remember.

Q. And then they would be returned with the checks to the board?

A. Yes, sir; some arrangement like that.

Q. I now show you another check of the West Chicago park com-

missioners, in the same form, drawn upon the treasurer, and ask you if that check was also paid at the bank of E. S. Dreyer & Co., and out of that account of the West Chicago park board (handing witness paper).

309 Judge MORAN: Let me see it.

(The paper was handed to Judge Moran.)

Mr. BARNES: I have not offered it in evidence.

Judge MORAN: But you asked if it was paid.

Mr. BARNES: Yes, sir; I asked if it was paid.

Judge MORAN: The trouble about it is, it is payable to E. S. Dreyer & Co.

Mr. BARNES: Yes; I will show that.

Judge MORAN: Well, show where it is paid.

Mr. BARNES: I cannot introduce the warrant until I introduce it. I have got to ask some preliminary questions before it becomes competent. I asked him if it was paid out of that account.

A. Yes, sir.

Q. Look at the voucher attached to it. Can you tell what that check represents?

A. Yes, sir.

Q. What does it represent?

A. The check or the voucher?

Q. I mean the check itself; what does the check in your hand represent?

A. The check represents—it is drawn——

Q. I mean, is there a voucher attached to it?

A. Yes, sir; the voucher follows.

Q. Does it represent the voucher attached to it?

A. Yes, sir.

Q. Now, look at the voucher attached to it.

Judge MORAN: I don't know what you mean by "representing the voucher."

310 Mr. BARNES: Represents the amount in the voucher.

The COURT: What you mean to enquire is as to whether the check as drawn is for the payment of that voucher?

A. Yes, sir.

Mr. BARNES:

(Q.) Now, look at the voucher attached there; was the money paid out on that voucher in the first instance?

A. Well, as far as I remember, they always came together. The second one is not a voucher; it is a special-assessment warrant that you asked me to look at.

Q. Yes; a special-assessment warrant; did the check come along with it?

A. As far as I remember, yes, sir; they belong together, those two (handing paper to counsel).

Q. There is stamped "paid" on this voucher here all through?

A. Yes, sir.

Q. And if you notice the date of the warrant it does not cor-

respond with the date of the check, Mr. Berger; is there anything here to show when this voucher was paid?

A. It was undoubtedly paid with the check; they belong together, those two.

Q. Well, look and see (handing witness paper).

A. There is nothing else to show when it was paid.

Q. Let me ask you this question: Did you ever pay out of that account vouchers like that presented without a check accompanying it in the form of that check? You see it is addressed, do you, to the treasurer of the West park board, the voucher is?

311 A. Yes, sir. I would never have paid it without either a check or a letter that we should pay it; this alone would not have been enough to pay it.

Q. Did you ever pay it——

A. No, sir; not alone, without another order of some kind.

Q. Without an order of some kind?

A. Yes, sir.

Q. What do you mean by that—a letter?

A. Usually every month they send us a letter, what will come due and we should pay a certain——

Q. Did you ever pay any moneys out on a letter alone?

A. No; not alone.

Q. I will ask you this question: Isn't it a fact you never paid moneys out on a letter unless a voucher or a coupon of a bond or a bond itself made payable at the treasurer's office was presented with the letter? Isn't that true?

A. Yes, sir.

Q. Now, look at those coupons (handing witness paper) and also the bond on the other side. Now, Mr. Berger, did you ever pay any bonds without a check or a letter or an order to pay them?

A. I did not.

Q. Did you ever pay them without a check on the treasurer?

A. We did.

Q. What is it?

A. Yes, sir.

Q. The bonds themselves that you paid were all made payable by their terms, were they not, at the treasurer's office?

312 Judge MORAN: That is not a proper question. The bond will show.

Mr. BARNES: I will withdraw the question. Was that bond there and those coupons paid at the treasurer's—paid out of this account of the West park board?

A. The bond was, but I see none of the coupons that are paid out of E. S. Dreyer's & Co.'s bank.

Q. There are none of them paid?

A. There are none of them there that shows his cancellation. To the best of my knowledge, there isn't any there that was paid out.

Q. They are all marked cancelled?

A. Yes, sir; but that is not our stamp; some other bank cancelled those. You see on the bond our stamp.

Q. They are not all marked cancelled, but some of them are marked cancelled.

A. Yes, sir; but not by him.

Q. But did you pay coupons the same in form as this?

A. Yes, sir.

Judge MORAN: I am not very particular about this matter, but there is a great deal going in here about "the same in form." The witness says those that are shown him were not paid by them. Now, he says, "Did you pay the same in form?" I don't regard it as very material, and I don't want to take up the time of the court in discussing it. It is loading up the record.

Mr. BARNES: I don't desire to load up the record, but I
313 desire simply to show this: that those bonds and their coupons are made payable at the office of the treasurer of the West Chicago park commissioners, and that when they were presented there at the office of Mr. Dreyer, as treasurer, he paid them out of this account without any check on the bank.

Judge MORAN: That is exactly what I tried to prove by your man Kennedy the other day.

Mr. BARNES: Yes, sir; you drew it out, and I want to show exactly that those were the only matters that were paid out that were not paid out on the check on Dreyer, and that the reason that they were paid out was because they were made payable at the treasurer's office.

Judge MORAN: There is no substantial dispute now between counsel and myself as to the fact. What he attempted to establish the other day was that there never was a single cent paid out of the West park fund in Dreyer's bank without a check of the kind that he exhibited in evidence. I showed and tried to get in evidence then, and your honor remembers it was excluded because it was not cross-examination, orders or written letters, signed by the secretary, directing the payment of certain things—coupons and special-assessment warrants—out of the funds in bank. Now, counsel says that is so. That was all I was attempting to show. I am going to prove it when it comes to our case by putting this in and showing it was done so. For what purpose? To show how this fund was
314 dealt with by this West park board all the way through.

Mr. BARNES: To show how it was dealt with by the treasurer?

Judge MORAN: To show how it was dealt with by the treasurer.

Mr. BARNES: What is the last question?

(The last question and answer were read.)

Mr. BARNES: I will withdraw the question for the time being.

Q. You say this bond was paid at the bank?

A. This cancellation stamp is ours.

Q. That is your cancellation stamp?

A. Yes, sir.

Q. How do you know that the coupons were not paid there?

A. They don't carry our cancellation stamp. There is none there that was cancelled at the bank.

Q. Do you know they were not paid by you?

Judge MORAN: You will get at it, Mr. Barnes, if you will see what date the bond came in.

Mr. BARNES: This bond was payable the 1st day of July, '99. It's payable in '99.

Judge MORAN: How could that be? December, '96, is the last he ever had to do with anything that came there.

Mr. BARNES: I know, but it may have been taken up. It is payable in '99, and he says it was paid. Now, let me see when these checks were——

Judge MORAN: Of course they were all cancelled before
315 that time—must have been in the very nature of things.

Mr. BARNES: Now, take these coupons, the last coupons, numbered from July, '94. They begin number 30—coupons number 30 to 40. Now, I see the other coupons were before Mr. Dreyer's time, but from 30 to 40 there; now, were they paid at the bank, Mr. Berger?

A. No, sir.

Q. How do you know?

A. They are not cancelled. Everything I paid was cancelled at once, so it wouldn't go out again.

Q. Do you know how they were paid?

A. No, sir; I don't know. You mean these, or coupons as a rule?

A. Coupons from 30 to 40.

A. No, sir; I don't know how they were paid.

Q. Do you say they were not paid out of this account?

Judge MORAN: Now, if the witness don't know how they were paid, what difference does it make whether he says——

Mr. BARNES: He said they were not paid. I want to show by him that he is not correct. I will show he is mistaken.

Q. Do you say those were not paid out of this account?

Judge MORAN: Now, your honor, what shall be the ruling on this course of examination? This witness looks at certain coupons, and he says he don't know how they were paid.

Mr. BARNES: No; he says they were not paid.

Judge MORAN: Not at all. He says he don't know how
316 they were paid. They were not paid by him.

The COURT: I understood him to say more than that—that they were not paid at the bank of E. S. Dreyer & Co.

The WITNESS: Yes, sir.

Judge MORAN (to the witness): Do you say that?

The COURT: Yes, sir; I understood him to say that. Now, he may ask him whether he knows they were not paid out of that account in the bank of E. S. Dreyer.

Judge MORAN: What figure does it cut whether they were or were not? What issue does it tend to illustrate in this case? We are making no claim in reference to it. We substantially agreed here

through counsel yesterday reading in the balance shown in those books against this account—$316,000 and some cents.

Mr. BARNES: This is what I am trying to get at, if you will admit it: That coupons—that bonds and coupons of the West park board were made payable at the treasurer's office, and they were paid there, and they were paid out of this account of the West park board. If you admit that, I have no further to go.

Judge MORAN: I insist that the orders upon the treasurer—the orders and drafts upon the treasurer—shows how they dealt with this fund.

Mr. BARNES: You neither admit anything—you object if you don't admit.

Judge MORAN: I object, but don't admit.

317 Mr. BARNES: You say one minute we practically agree, and then when I ask you if we do agree then you branch out on something else and will not answer me categorically whether you admit what I am trying to prove. If you don't admit it, I must prove it. Do you admit that the bonds and coupons of the bonds issued by the West park board were made payable at the office of the treasurer and were paid by the treasurer out of the account of the West Chicago park board kept in Mr. E. S. Dreyer's bank while Mr. Dreyer was treasurer? If you admit that, I have no further to go. If you don't, I have got to prove it.

Judge MORAN: The essential thing—you talk about my not categorically answering your propositions—the essential thing here I have let the evidence go in on and don't dispute—that this balance of this fund stood $316,000 odd dollars and odd cents—I don't remember. That's the essential thing here.

Mr. BARNES: That's where we differ.

Judge MORAN: Now, counsel in attempting to make out his case insisted strenuously and got his witness to swear that nothing was ever taken out of that fund, except on checks of the form that he put in evidence, signed by E. S. Dreyer, treasurer. I undertook, by cross-examination, to show that that was not so. Now, that is the point. Were there other orders given by that board, directed to Dreyer & Co., to pay money out of that fund that were not orders

318 signed by the secretary and auditor and countersigned by E. S. Dreyer? It is showing, not how much was paid—that is not disputed—but the method of dealing with this fund. Counsel now having found himself in that position wants to put in a lot of bonds and everything of that kind, not to show this amount that we agreed upon at all, but to show now that—to get out of the position that his witness took—that nothing was paid out of that fund except upon these orders that he put in. That is the position counsel is in.

Mr. BARNES: Now, let me state my position. He states it pretty nearly correct—not fully. It is true we claimed then and we claim now that whatever was drawn out of the account known as the West Chicago park board account kept in the bank of E. S. Dreyer & Co. was drawn out by checks on E. S. Dreyer, treasurer, drawn by the West Chicago park board; that not a single dollar was ever drawn

out of that account by a check or an order on the account itself by the West Chicago park board. Our witness originally stated that. On cross-examination it appeared some letters were shown him addressed—well, they were not in evidence—and he was then asked, after looking at those letters, if it was not a fact that some moneys were paid out without an order on E. S. Dreyer, treasurer—if there were some moneys paid out by an order of the West Chicago park board. The witness said they were paid out—some moneys were paid out before the check arrived, but stated that they were replaced by a check; and, being asked what they were, he said that
319 bonds and coupons maturing, which were payable at the treasurer's office, were paid; that assessment vouchers or rebates were paid, and that afterwards a check was issued on E. S. Dreyer, treasurer, for that amount of money. Now, that there may be no misunderstanding with the jury as to how this account is controlled, I propose to follow out in detail what was drawn out by counsel himself, for the purpose of showing that, outside of the direct payment of the orders drawn on E. S. Dreyer, treasurer, there were some moneys paid, but not a single dollar was paid out aside from those orders except on coupons and bonds and assessment rebates made payable at the treasurer's office, and that Mr. Dreyer paid out the moneys on those when they were presented, and that when that was done he held the vouchers until a check came in, drawn on him as treasurer, to replace the vouchers he had paid out, thereby making the check itself and the check only the evidence of moneys drawn out of this account.

The COURT: Well, I think you may ask the witness whether that was the method pursued relative to payments made on bonds or coupons or special-assessment rebates.

Judge MORAN: That is an understanding now, your honor, to prove what we don't disagree about.

Mr. BARNES: Then if we agree on that we need not go any further.

Judge MORAN: Let us wait and see. Then you say now that there were checks given after this money was paid out to
320 make the account right?

Mr. BARNES. Yes, sir.

Judge MORAN: I think very likely that's so.

Mr. BARNES: I show you one (indicating).

Judge MORAN: I think very likely that's so. That shows my position to be correct; but the money was paid out on letters from the West park board. However they made their accounts up afterwards I don't know.

Mr. BARNES: Have you got those letters here? Let's see if we cannot agree right now. We can agree upon this, I think.

Judge MORAN: I will agree on anything that is the real fact.

Mr. BARNES: We will shorten this matter and get at the facts. I think we can agree and shorten this. Now, it is agreed that this letter may go in evidence.

"West Chicago park commissioners, office in Union park.

CHICAGO, *March* 20, '96.

Messrs. E. S. Dreyer & Co., Washington and Dearborn streets, Chicago.

GENTLEMEN: I am directed by the finance committee to notify you to redeem, when next presented for collection of interest, special-assessment warrants numbers 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25, dated September 20, '95, for $1,000 each, and issued to the Western Paving & Supply Co. for work performed in connection with the Douglas Boulevard improvement.

Yours very truly, GEORGE F. TALTY, *Secretary.*"

321 And that the special-assessment warrant referred to in that letter, number 16, with coupons attached, reads as follows:

"*Special-assessment Warrant Number* 16.

CHICAGO, *September* 20, '95.

To the treasurer of the West Chicago park commissioners:

From the funds to be realized from the special assessment duly made and levied by the corporate authorities of the town of West Chicago on the 28th day of March, '93, and confirmed by the county court of Cook county, Illinois, on the 8th day of July, '93, for the purpose of improving Douglas boulevard, in the city of Chicago, Illinois, but out of no other assessment or fund, on the 20th day of September, 1900, pay the Western Paving & Supply Co. or order the sum of $1,000, with interest thereon at the rate of 6 per cent. per annum, payable semi-annually, after the date hereof, which interest is evidenced by the ten coupons hereto attached and numbered from one to ten. The special assessment so made, levied, and confirmed is specially appropriated, set apart, and pledged to the West Chicago park commissioners for paying the cost of the improvement of said Douglas boulevard, and this warrant is given in payment of part of the work, labor, and material furnished for such improvement.

It is hereby expressly agreed by the holder of this warrant that the West Chicago park commissioners shall and do have the
322 right to pay the whole or any part hereof upon any semi-annual interest day after the said 20th day of September, '95.

HARVEY T. WEEKS, *President.*

GEORGE F. TALTY, *Secretary.*"

To which are attached the several coupons, which I will not read, for the interest—semi-annual interest:

"The treasurer of the West Chicago park commissioners will pay out of funds realized from the Douglas Boulevard special assessment mentioned in annexed warrant one, to the holder thereof, $30 on the 20th day of September, 1900, at his office, being the semi-annual interest on warrant as numbered above, to which this coupon is attached.

GEORGE F. TALTY, *Secretary.*"

Each coupon being alike, with the exception of the date of the maturity, and that this special assessment was paid in the bank after the receipt of the letter just read. That on April 20th, '96, the following order was issued, to wit: "$10,000. Chicago"——

Judge MORAN: But the money was paid by E. S. Dreyer & Co. after the receipt of that letter.

Mr. BARNES: That it was paid out of the account of the West Chicago park commissioners at the bank of E. S. Dreyer & Co.; paid out of that account the same as other moneys.

Judge MORAN: Paid by E. S. Dreyer & Co., and here came the order afterwards, to make the account right, charging it against the West park board.

Mr. BARNES: As a matter of fact, every dollar paid out of the bank is legally paid out by E. S. Dreyer & Co., isn't it? So
323 we don't want any haggling about words.

Judge MORAN: No; we want the exact facts. The exact facts are these, are they not: that the moneys paid out on this special-assessment warrant just read were paid out at the bank of E. S. Dreyer & Co., out of the account of the West Chicago park commissioners, the same as all other moneys that were paid out of the account? Is that not the fact?

Judge MORAN: No; that is not the fact. Here is what was done: The money was paid by E. S. Dreyer & Co. It was afterwards charged up against that account upon this order coming from the West park board, a month afterwards. It eventually came out of that fund. There is no dispute about it; that they paid no money that they did not get from the West park board. It came out of the West park board's money.

Mr. BARNES: Do you mean to say this: That the moment the money was paid out on this special-assessment warrant it was not charged up to the account of the West Chicago park commissioners?

Judge MORAN: If you know that—if you say that, you know that.

Mr. BARNES: If you ask me, I don't know.

Judge MORAN: But the money eventually—there is no dispute where it was taken from. It was taken eventually out of that money. It was done upon that order, and it is not drawn by E. S. Dreyer, treasurer, nor endorsed by E. S. Dreyer, treasurer.

324 Mr. BARNES: Let us agree upon the fact; we will argue it afterwards.

Q. Mr. Berger, when this special-assessment warrant which has just been read was paid, out of what account was it paid?

A. It was charged to the account of the West park board.

Q. At the time of the payment of it?

A. Yes, sir; the same day when it was paid, the evening of it.

Q. Now, was this accompanying check or was this check of April 20th, '96—do you know whether it was paid out on the receipt of that order or check as it is called, or order, or whether it was paid out before?

A. I don't know.
Q. You can't tell?
A. I can't tell.
Q. Now, in the course of business, Mr. Berger, did you sometimes—I think that is what we will agree about—did you sometimes pay out these special-assessment warrants out of this account without a check or a draft or an order on E. S. Dreyer, treasurer?
A. I never paid them without a previous order.
Judge MORAN: Without what?
A. A previous order.
Q. He asks you a check.
Mr. BARNES: A check or an order.
Judge MORAN: You paid them on letters?
A. Yes, sir; we paid them on checks.
Mr. BARNES: Yes; on a check or an order like this on
325 E. S. Dreyer, treasurer?
A. Yes, sir.
Q. When you did that wasn't a check or an order on E. S. Dreyer, treasurer, for the amount paid out subsequently brought to the bank?
A. Yes, sir.
Q. It was brought for the express purpose of representing the moneys that were paid out on the abatement, special abatement——
Judge MORAN: Assessment.
Mr. BARNES: Special-assessment warrant—when you did so pay out on such assessment warrants?
A. In my opinion it was.
Q. This check which is attached to this warrant which I have shown you represented the moneys that were paid out on that special-assessment warrant?
A. It represents ten of such warrants. It was a check for $10,000, while the warrant is only for $1,000.
Q. Ten of such warrants?
A. Ten of such warrants.
Q. And you paid one of those warrants at a time?
A. Yes, sir.
Q. A thousand dollars one time?
A. Yes, sir.
Q. A thousand dollars a week from it?
A. Yes, sir.
Q. And then when they were paid the check was given to represent the entire amount?
A. Yes, sir.
Q. As fast as they were paid they were taken out of the West Chicago park commissioners' account?
A. Yes, sir.

Mr. BARNES: I think those are the facts.
326 Judge MORAN: The facts, as far as we have agreed upon them, are all right.
Mr. BARNES: Now, shall we read that check in? There is no need. He has testified to it. Now, one more question, Mr. Berger.

Q. Did you have checks or drafts of that form—you said you knew of no other form—to represent every dollar that was drawn out of the account of the West Chicago park commissioners?

A. Yes, sir.

Q. When the bonds were paid

Q. When the bonds were paid or coupons, were checks also given for that?

A. Yes, sir.

Cross-examination by Judge MORAN:

Q. You have heard this letter read, Mr. Berger?

A. Yes, sir.

Q. The March 20th letter. Now, under that letter you paid out, E. S. Dreyer & Co. paid out, the money on these things when presented?

A. Yes, sir.

Q. And E. S. Dreyer & Co. afterwards got an order from the West park board in their favor like this: "Pay to the order"—that counsel has read to you—"Pay to the order of E. S. Dreyer & Co." the money?

A. Yes, sir.

Q. Now, what was that for—straightening out the account?

A. Yes, sir.

327 Q. It was to straighten out the account?

A. It was the regular proceeding.

Q. You don't see any endorsement of the treasurer there, do you (indicating)?

A. No, sir.

Q. No endorsement of the treasurer?

A. No, sir.

Q. Simply a straight direction from Talty——

Mr. BARNES: It shows itself; it speaks for itself.

Judge MORAN: —just on that, without any signature of the treasurer in these cases that counsel has been calling your attention to now, you kept the account?

A. Yes, sir.

Judge MORAN: Now, have you got these—you offered some in evidence the other day that were said to be the only form——

Mr. BARNES: That's the only one (indicating).

Judge MORAN: That was offered the other day?

Mr. BARNES: That was offered today. That is the only one that has been introduced in evidence, and he testifies that was the only form used. It is the same as that.

Judge MORAN: Dreyer didn't countersign them. That is the point. (To the witness:) He didn't countersign these checks that you got in this way?

A. Not always.

Q. Now, this one, I believe, is for $10,000, it appears (indicating)?

A. Yes, sir.

Q. They were for large amounts, were they?

A. Yes, sir; most of them were for large amounts; some
328 of them small amounts.

Judge MORAN: Will you admit that there were a large number never endorsed by E. S. Dreyer, treasurer?

Mr. BARNES: You don't mean endorsed—countersigned?

Judge MORAN: Yes; not countersigned by E. S. Dreyer.

Mr. BARNES: There were a large number that were not and a large number that were. The relative proportion is not known, but in both instances they were paid out of the account of the West park board.

Judge MORAN: The point I want to get at—I don't want to put all these in evidence—is that there was a large number of orders for large amounts directly to E. S. Dreyer & Co.—that is, to pay to E. S. Dreyer & Co. from the West park board for money that they had theretofore paid out—letters similar to the one read by counsel in evidence, to pay, without these orders being—without being countersigned by E. S. Dreyer, treasurer. There is no dispute but what the money came out of the West park board and went into the West park board's account.

Mr. BARNES: You mean that the order you speak of was an order the same in form as State's Exhibit "K"—the same in form—an order drawn on the treasurer in favor of E. S. Dreyer & Co.?

Judge MORAN: Yes, sir, in form, but not countersigned by E. S. Dreyer. The one you have got, "State's Exhibit 2," were countersigned.

329 Mr. BARNES: Some were countersigned and some were not. I agree to it.

Judge MORAN: No; that there was a large amount payable to E. S. Dreyer & Co. not countersigned.

Mr. BARNES: I don't know how large the number was. I will agree some were and some were not. I think that covers the fact. As to the large number, I don't know how many there were. I never looked to see.

Judge MORAN:

(Q.) Well, was the number of those that were paid out—was it small or was there just a small number paid or was there a large number of them paid in that way?

A. At first, the first month or two, Mr. Dreyer signed them, countersigned them. After that they were not countersigned. There were many thousands of them not countersigned.

Q. Many thousands?

A. Yes, sir.

Q. Now, Mr. Berger, these orders that we have been talking about this morning were orders to pay to E. S. Dreyer & Co. the money?

Mr. BARNES: Put one of them in evidence, that one that represents $10,000.

Judge MORAN: That one; yes, sir.

Mr. BARNES: I think there were others like it.

Judge MORAN: Yes, sir.

Q. Now, those were not things deposited to the account, but things taken out of the account, weren't they?

A. Yes, sir.

330 Mr. BARNES: They speak for themselves.

Judge MORAN:

(Q.) Now, when anything was brought in from the West park board in the shape of money, where was it put to first; where did it go to; where did you send it to?

A. It was sent——

Q. To what bank did you send it?

A. All the money that came went to the National Bank of Illinois.

Q. National Bank of Illinois?

A. Yes, sir.

Q. The checks payable to the West park board, to the fund, or to E. S. Dreyer, treasurer; where did you send them to?

A. National Bank of Illinois.

Q. You were asked yesterday if there were not sometimes during the year that Dreyer was treasurer when the balance of E. S. Dreyer & Co.'s account kept in that form on the books of the National Bank of Illinois was overdrawn. You said there were instances when it was overdrawn?

A. Yes, sir.

Q. One instance, I think, of $117,000?

A. Yes, sir.

Q. Overdrawn?

A. Yes, sir.

Q. It continued to be overdrawn for quite a while, did it?

A. Yes, sir.

Mr. BARNES: You objected to that and it went out?

Judge MORAN: You got it in?

Mr. BARNES: No, sir.

Judge MORAN: Yes; you did; you got it in.

Mr. BARNES: No; I think not. Well, let it go.

331 Judge MORAN: Now, during that time when it was overdrawn, was the National Bank of Illinois paying the orders of the West park board for money?

332 Mr. BARNES: I don't see that that is material.

Mr. MORAN: Well, I think it is.

The COURT: Well, if——

Mr. BARNES: We are not complaining that nothing was paid; that the orders of the West park board were not honored by E. S. Dreyer & Company when presented. We are complaining that he had in his hand $316,000 at the last which was not paid, which he has failed to turn over. We are making no complaint that no draft or bonds, orders of the West park board, were not honored prior to that time. How is it material?

Mr. MORAN: How was it material that you insisted in putting in state of accounts yesterday?

The COURT: Let's see, Judge Moran. Is this a matter that the

witness knows from personal knowledge? He was not in the National Bank of Illinois.

Mr. MORAN: But he knows the course of business. That, of course, the witness can tell, if he knows.

The COURT: You can show the course of business, I think.

Mr. MORAN:

Q. Now, do you know what the course of business was, with reference to these checks or drafts or orders of the West park board——

A. Yes, sir.

Q. —about money being paid or not, when in the National Bank of Illinois the account was overdrawn?

A. Yes, sir.

Q. You so know it?

A. Yes, sir.

333 Q. Were they or not paid when the account was overdrawn?

A. They were paid.

Q. In large amounts?

A. Yes, sir.

Q. How much was in the last ninety days before the failure of the National Bank of Illinois, can you tell?

A. A very large amount. I can only guess. I couldn't tell without looking it up. A very large amount, though.

Mr. BARNES: Do you mean how much was overdrawn?

(This remark was addressed to defendant's counsel.)

Mr. MORAN: No, sir; how much was paid out to the West park board in the last ninety days at the National Bank of Illinois.

Mr. BARNES: Do you know?

Mr. MORAN: Do you know?

The WITNESS: Well, not the exact amount.

Q. You haven't figured the exact amount?

A. No, sir.

Q. You say a very large amount?

A. Yes, sir.

Q. Could you say whether it was over a hundred thousand dollars?

A. Yes, sir; much.

Q. Over two hundred thousand dollars?

A. Yes, sir.

Mr. BARNES: I object guessing on the matter. Put your evidence in. I will admit whatever is paid out of the account.

Mr. MORAN: This is cross-examination.

334 Mr. BARNES: I don't think it is, but I am not objecting on that ground.

Mr. MORAN: Can you tell whether it was two hundred thousand dollars or not?

A. It was more than that.

Q. Do you know—I don't know whether you do or not; I want to

find if you do—do you know when the last draft of the West park board was paid that was paid—the last one before the failure?

A. I don't know.

Q. You don't know?

A. No, sir.

Mr. BARNES: Well, they are all shown on the last month's account. We have no vouchers for anything paid out after November 30th—we have no vouchers for it.

The COURT: I don't quite understand your question. What I gather is that when this account of Dreyer with the National Bank of Illinois was overdrawn, so that Dreyer & Company were indebted to the National Bank of Illinois in the sum of one hundred thousand dollars, that notwithstanding that the National Bank of Illinois continued to pay drafts which were made by the West park board on Dreyer.

Mr. MORAN: Yes, sir; that every draft was paid right out.

The COURT: So that it was apparently continuously an increase, as the drafts were made on Dreyer. It would increase in that way continually the overdraft.

Mr. MORAN: That is, if there was nothing on the other side.

335 The COURT: That is to say, if there was, as he says, a hundred thousand dollars overdrawn, then they paid out over two hundred thousand dollars; then it would make an overdraft of more than three hundred thousand dollars.

Mr. MORAN: That would be so if there were nothing on the other side.

The COURT: Yes; that is so. Yes, of course; if there was nothing on the other side.

Mr. MORAN: You see, at different times—it already appears, your honor, that at different times from the beginning of the account there was sometimes a—I think the first item, or about the first that counsel called attention to, was two hundred and ninety-three thousand——

Mr. BARNES: Two hundred and forty-nine thousand.

Mr. MORAN: Two hundred and forty-nine thousand of a credit, and after that, in a short time, there was a debit; then there was a credit again. The account went up and down all the time.

The COURT: You mean the account of Dreyer with the National Bank of Illinois?

Mr. MORAN: As it was kept by the National Bank of Illinois; yes, sir.

Mr. BARNES (to Mr. Moran): There is one thing I forgot to ask him about, Judge. On the redirect I will call attention to it, or I can——

The COURT: Are you through, Judge Moran?

336 Mr. MORAN: No; Mr. Barnes says he has something to ask.

Mr. BARNES: Will I do it now?

Mr. MORAN: Well, I think I will go on.

Mr. BARNES: I wanted to call your attention to it, because I overlooked it.

Mr. MORAN: Well, I don't object to your doing it.

Q. You were in the employ of E. S. Dreyer & Company for quite a number of years? I think you said fifteen years?

A. Yes, sir.

Q. Were you all of that time teller for E. S. Dreyer & Company?

A. No, sir.

Q. For what time were you teller for E. S. Dreyer & Company?

A. About eight or ten years. I don't exactly remember, but——

Q. About eight or ten?

A. Eight or ten years.

Q. That is, the last eight or ten years before the failure?

A. Yes, sir.

Q. Now, Mr. Berger, who looked after the banking business, the banking part of the business of E. S. Dreyer & Company?

A. Mr. Berger.

Q. Mr. Berger?

A. Yes, sir.

Q. What part of the business did E. S. Dreyer attend to?

A. Real estate and loans and things.

Q. Real estate and loans?

A. Yes, sir.

Q. You said that he had an office in the bank?

A. Yes, sir.

337 Q. He had an office in the bank where he transacted his part of the business?

A. Yes, sir.

Q. Now, in drawing checks, who usually drew the checks on the National Bank of Illinois for E. S. Dreyer & Company?

A. Most of them I drew.

Q. Most of them you drew?

A. Yes, sir.

Q. In the regular course of your business?

A. Yes, sir.

Q. As between Dreyer and your brother, Mr. Berger, who drew the checks, if he drew any——

Mr. BARNES: Well——

Mr. MORAN: I mean did Berger draw the checks that were drawn not by you?

A. Yes, sir.

Q. Now, did E. S. Dreyer & Company have vaults, bank vaults?

A. We had the regular vault, but not a very large one.

Q. Was it a burglar-proof?

A. No, sir.

Q. During all their course of business, while you were with them where was the money of that concern kept?

A. Well, most all of it was kept in the National Bank of Illinois——

Q. National Bank of Illinois?

A. Except a small amount that we kept——

Q. How much did you keep on hand, if you had any regular rule about it, in money, in your own banking office?

338 A. Well, from twenty-five hundred dollars to perhaps five thousand dollars.

Mr. MORAN: We are waiting for these deposit books, Mr. Barnes. You might ask your question now.

Mr. BARNES: Well, I will ask him on that point. I wanted to cross-examine also on what you have been asking.

Mr. MORAN: Well, you better keep them distinct. You make him your witness now.

Mr. BARNES: Yes; this is part of the examination-in-chief.

Q. You testified, Mr. Berger, yesterday to the—I don't think it was you that testified to it. Was there interest paid on this account of the West Chicago park commissioners?

A. Yes, sir.

Q. How was it paid?

A. Credited to the account and a statement of it was sent to the park.

Q. It was credited when?

A. At the end of every month or three months; I don't remember. I figured it up.

Q. You figured it yourself?

A. Yes, sir.

Q. And put it on the books?

A. I think I wrote a letter to the park that there was interest, so much at this time, due on their account, and I had credited to that account, the West Park account. That I can't remember. I am not quite sure of that.

Q. Well, why did you credit interest to that account?

339 A. Well, I was told to do it.

Q. Who told you to?

A. I suppose Mr. Dreyer.

Q. Well, did you credit interest to any other account?

A. Some of them; yes, sir; some depositors.

Q. What is that?

A. Some depositors; regular depositors.

Q. Some depositors. You had an agreement with them, did you, to pay interest?

Mr. MORAN: I object to that.

The COURT: I think that is objectionable, what agreement he had with depositors.

Mr. BARNES: Very well; I will withdraw it.

Q. Is it a fact that you credited interest to the West Chicago park commissioners' account because the law in force at that time required the treasurer to account for interest at two per cent. on the daily balances in his hands?

Mr. MORAN: I object. Here is a mere teller in the bank makes up the account; credits it——

Mr. BARNES: If he knows.

The COURT: Well, if Mr. Dreyer said anything to him about it or he had any communication with Dreyer on the subject, why, he can give that.

Mr. BARNES: He says Dreyer told him.

The COURT: Now, what did Mr. Dreyer tell you? Answer that, what Mr. Dreyer said to you on this subject.

The WITNESS: I don't remember any special conversation
340 about this interest matter at all. There was surely nothing said about the law.

Mr. BARNES:

Q. Now, tell me, did you ever pay the interest in any other way than crediting it up on account?

A. I don't remember of any other way.

Q. Did you ever pay any moneys out to anybody for interest?

A. Not that I remember.

Mr. BARNES: Now, that is all that I wanted on the direct; that I had forgotten.

Mr. MORAN: Well, I will take him right on that now.

Q. You credited interest on account?

A. Yes, sir.

Q. You credited interest each month?

A. Either each month or every three months, I am not——

Q. From the beginning of the account?

A. Yes, sir.

Q. Now, can you tell in all, how much money of the West park commissioners came into Dreyer's account, how much came to his hands as treasurer?

A. I can't tell without reference to the book.

Q. Well, tell by reference to the book.

A. I can figure it all up.

Mr. MORAN: Well, we have got it in some short shape here.

Q. Can you approximate the amount without stopping to figure it up?

Mr. BARNES: I object; in the first place, it isn't material.

Mr. MORAN: Well, the question is whether he can approxi-
341 mate it.

Mr. BARNES: Well, I object to that. It don't make any difference whether he can approximate it or not.

The COURT: I don't see what the object of this is.

Mr. MORAN: The object of it is, your honor, counsel has attempted to make out that money credited to an account running through three years has not been paid. Now, of course, it is well understood that the first items of the account on one side cancel the first items of the account on the other, and I want to show that this money was drawn continually out of the account. Money credited the first month when the account was there would be drawn by the first items of the second month.

Mr. BARNES: That I agree to.

The COURT: Of course that is the case with all accounts. It seems to me the thing you are trying to get—the way is to ask him directly, take it altogether, how much interest was ever credited to that account.

Mr. MORAN: Well, we have got that amount, your honor; we have already proved that.

Mr. BARNES: That is already in evidence?

Mr. MORAN: That is already in evidence. It approximates——

Mr. BARNES: Fifteen thousand or sixteen thousand dollars; somewhere along there.

342 Mr. MORAN (to the assistant State's attorney): Well, then, you agree, then, that the money could be drawn, item by item, of the account?

Mr. BARNES: Yes, I will agree to this point—I think you will, too—that there was always in his hands a great many more thousand dollars than the interest he would credit up.

Mr. MORAN: Now, you see what counsel wants. He wants to argue on the question. I want to show that these items were drawn out. If they put items in again he can't say that *that* we didn't pay our interest.

Mr. BARNES: Oh, well, that is a mere matter of argument.

Mr. MORAN: Exactly, and you want to get that argument in. I want to show that the first month you credit up so much interest and then it is drawn out; that the interest is drawn out.

Mr. BARNES: It is a matter of argument, isn't it?

Mr. AUSTRIAN: No; it is a matter of law.

Mr. MORAN: It is a matter of law.

Mr. BARNES: Then the witness can't give it as a matter of law. He is not a lawyer.

Mr. MORAN: Don't let's try to be too smart.

The COURT: Well, Judge Moran, it seems to me that if there were fifteen thousand dollars altogether credited as interest, then the account at its close must have been fifteen thousand dollars more of a debit to Dreyer than it would have been if there had not been any interest credited.

343 Mr. MORAN: Well, you will see the position counsel takes. He wants to argue to the jury that this interest was not paid; that it was nothing but book-keeping, charging it up on the books; that is all. I want to show by the amount of money paid in and the money drawn out that the interest charged up at different months was actually taken out by the West park board, and that ran along through the whole account.

Mr. BARNES: I will tell you what I will agree to. I will agree to put in the whole account of the West Chicago park board.

Mr. MORAN: What whole account are you talking about now, Mr. Barnes?

Mr. BARNES: The whole account of the West Chicago park board, beginning with the item that we put in evidence, showing every dollar that was put in from the beginning and every dollar that was

taken out. I will put it all in, and I ask now that it all go in. Then we will find out how much money he always had on hand.

The COURT: I think——

Mr. MORAN: I will prove the exact amount by another witness, your honor. The question here is whether he could approximate the amount.

Q. Now, then, does the amount of interest credited to the account go into the balance here? Does the amount of interest show in the balance that is struck here of $316,000?

344 A. No, sir; shows just one amount.

Q. Shows what amount? I mean doesn't it go into the credit balance?

The WITNESS: I don't quite understand that question.

Q. Suppose it is $16,000 interest——

Mr. BARNES: I will admit it, Judge. Of course it does.

Mr. MORAN: I see the policy of your admissions now. It is to get in with the admissions somewhat of argument or hint.

Mr. BARNES: Not at all.

Mr. MORAN: Now, let's prove it.

Q. If the amount of interest is $16,000 credited and the whole amount credited is $316,000, does that credit of $16,000 enter into the whole amount credited?

A. Yes, sir; it is part of it.

Q. Yes; every item of credit and every item of debit, on both sides, shows in the account?

A. Yes, sir.

Q. Now, let me ask you this: You understand book-keeping, do you?

A. Yes, sir.

Q. As a book-keeper, does interest credited up in the early items of account—is that as much actually paid out as checks drawn for money charged up in the early items of the account?

Mr. BARNES: Wait a minute. I object to that. The witness can't make an argument.

345 Mr. MORAN (to the assistant State's attorney): Well, do you admit that is true?

Mr. BARNES: I admit just exactly what he said last, that every item——

Mr. MORAN: Hold on, now. You accused me a little while ago of not categorically replying. Now, do you admit that the early items of interest in an account where the account is drawn against are just as much paid out as checks drawn on that account?

Mr. BARNES: Not if the principal has never been paid out; never.

Mr. MORAN: What?

Mr. BARNES: If the principal has never been paid out, I do not say that the interest is paid out, because it goes in with the principal; so that is a matter of argument. It don't amount to very much either way.

Mr. MORAN: No; but we are trying to make it amount to much.

Mr. BARNES: Oh, no; but I am trying to prevent you from making it amount to much.

Mr. MORAN: Oh, no; it is very plain what I want. The interest was there, and it was paid. Now, let's see; I was broken in upon by Mr. Barnes' redirect here. I want to see where I was at.

The COURT: Have you anything further, Judge Moran?

Mr. MORAN:

346 Q. You have been asked about the method of keeping this account with the West park board. Describe to the jury what was done. (A package of pass books is shown the witness.) I show you certain books called pass books. Answer whether those were brought to the bank; and, if so, by whom they were brought to the bank.

A. The secretary of the West park board or one of his employés.

Q. Well, now, when any money came to the bank that you had anything to do with, just tell how it was done—who brought it; if it was the secretary. If the secretary brought it, what did he do, and what did you do?

A. Why, the secretary would bring the money, just like any other depositor, with a deposit ticket and a book, and deposit in the window, and I would give him credit for it and enter it in the book and hand the book back and put the deposit in the cash drawer.

Q. (Paper shown witness.) He would bring a deposit ticket similar to this? I do not ask you this exact one, but in this form; bring a deposit ticket in that form?

A. Yes, sir.

Q. And hand it in with what?

A. With the money or checks.

Q. Or whatever they were?

A. Yes, sir.

Q. Now, what did you do? Did he hand in anything besides the deposit ticket?

A. No; excepting the checks and the money.

347 Q. Did he hand the book in?

A. Yes, sir.

Q. Deposit book?

A. Yes, sir; deposit book.

Q. What did you do?

A. I entered it on the deposit book, gave the book back to him, put the money or the checks in the cash drawer.

Q. Well, these deposit books I hand you were the ones actually used there?

A. Yes, sir; these are the ones, all of them.

Q. All of them?

A. No; there is one that is not. (The witness hands one of the books to counsel.)

Q. That is not one?

A. No.

Mr. MORAN: These are the books. I offer these—I don't know that I need offer them all; I will identify them all; I will identify these books.

Q. These are the actual books, you say?
A. Yes, sir.
Q. Just as they are now?
A. Yes, sir.
Q. Sometimes some other messenger than the secretary would come with the funds?
A. Yes, sir.
Q. Was the course the same when somebody else than the secretary came with the funds?
A. Yes, sir.
Q. He handed in the money, made the deposit, and you entered it on the book?
A. Yes, sir.

Mr. MORAN: These books are for identification. There are eleven of them. I don't know whether to identify them all in one pack.

Mr. BARNES: Well, any way you want to identify them.
348 Do you want to offer them in evidence now?

Mr. MORAN: No; I don't want to offer them in evidence now. This is cross-examination.

Mr. BARNES: The reason I asked is because it embarrasses me a little in rebuttal.

Mr. MORAN: Yes; I simply identify them with this witness who made the entries in them.

Q. (Paper shown witness.) You were shown yesterday a statement which you said you sent to the West park commissioners?
A. Yes.
Q. Were you in the habit of sending—you said you sent one, I think, every month, didn't you?
A. Yes, sir; every month.
Q. Now, did you ever send any like that before—like that one?
A. The others were made out "E. S. Dreyer & Co." where I have "E. S. Dreyer, treasurer."

Mr. BARNES: Well, I object to the contents of any of them.

Mr. MORAN: We have got letter-press copies of them. I gave you notice to produce them.

Q. (Letter-press book is shown the witness.) Did you make these statements out?

Mr. BARNES: You have there how many statements?

Mr. MORAN: Four, I think.

Mr. BARNES: And instead of their stating "Account of West park board" with E. S. Dreyer, treasurer, it states "Account of
349 West park commissioners" with E. S. Dreyer & Company; but they are statements of this kind, I admit; I admit you have that there; you can give the dates of them.

Mr. MORAN: There are four. We have given notice to produce

the originals and the originals cannot be found, and the counsel admits the letter-press copies of four accounts in this book dated——

Mr. AUSTRIAN: Dated June 1st, 1896; June 30th, 1896; August 5th, 1896, and October 31st, 1896——

Mr. MORAN: Which are copies of accounts sent by the witness to the board of West park commissioners, E. S. Dreyer & Company, and in the accounts of October 31st, 1896, appears an item of interest, $457.50.

Q. Now, never before in sending in did you send it in E. S. Dreyer, treasurer, except the one which his honor has in his hands now?

A. No; I think that is the only one that way.

Mr. AUSTRIAN: We want to recall this witness at two o'clock for one or two questions.

Mr. MORAN: With that exception, we are through.

Redirect examination by Mr. BARNES:

Q. Mr. Berger, do you know that you did not send, any other month, reports of this account to the West Chicago park
350 commissioners in the form of the last report—E. S. Dreyer, treasurer—do you know it?

A. I know it. I looked that through once.

Q. What?

A. I know it; yes.

Q. That you never sent another one but that?

A. Not to the best of my knowledge.

Q. Well, do you say you never did? That is what I want to know.

A. I looked it through once.

Q. Oh, you looked at a few?

Mr. MORAN: He looked it through.

The WITNESS: Looked them through.

Mr. BARNES:

Q. Did you look through all of them?

A. Yes, sir.

Q. And you always sent them this way?

A. Yes, sir.

Q. Why did you send this one; E. S. Dreyer, treasurer—the last one?

A. Well, there was no reason. I sent it.

Q. There was no reason?

A. No, sir.

Q. Had you ever heard and had you known, as an officer of the bank, after receiving all of these orders on this account, checking and paying them out—orders on E. S. Dreyer, treasurer—had it ever occurred to you that that was the account of the treasurer when you made that report?

Mr. MORAN: Wait a minute. This witness testified to putting in this report yesterday, your honor—a witness introduced by the State and evidence introduced by the State. I have cross-
351 examined him simply to show that it was the only one that he had ever sent that way.

Mr. BARNES: This is redirect examination to your cross.

Mr. MORAN: It is not redirect examination; it is the grossest kind of cross-examination of his own witness, and done in a sneering tone of voice, your honor.

Mr. BARNES: Well, you can't get that into the record.

The COURT: Well, this is put in, this last one, November 30th, 1896. The last one ever made is "E. S. Dreyer, treasurer." Now, the witness testifies that the statements which were made prior to that time were to E. S. Dreyer & Company. I think he may be interrogated as to how he made the change or why he made them E. S. Dreyer & Company.

Mr. MORAN: Well, is it redirect now, your honor? They put this in on yesterday.

The COURT: No, no; that is quite true, but now you put in some letters here, or some statements, which say "E. S. Dreyer, treasurer;" that introduces a new subject—that is, which say "E. S. Dreyer & Company," I would say—statements of account with E. S. Dreyer & Company. They may ask him why they sent those marked E. S. Dreyer & Company and why he made the change.

The WITNESS: There was no reason at all. In my mind there was no difference between the two at all at the time I made it. Simply it happened; that is the best I can say.

Q. Now, Mr. Berger, these deposit books that came there, were they ever balanced by the bank?

Mr. MORAN: I object.

352 The COURT: I don't understand that Judge Moran has offered those.

Mr. BARNES: I will have to recall him, then.

The COURT: Yes.

Mr. BARNES: Now, I will ask you, further, the deposit books that were shown you—did you keep those deposit books as you did the books of other customers and balance them up?

Judge MORAN: That is objected to. I haven't asked him anything about the contents.

The COURT: Judge Moran hasn't put them in evidence. I don't know that he ever will, and as a consequence I do not think you can interrogate about the deposit books at the present time.

Mr. BARNES: You say that Dreyer had a real-estate office in the bank. The business of E. S. Dreyer & Company was a bond business, wasn't it—banking and real estate?

Judge MORAN: I object. Counsel has shown that Mr. Dreyer was in the bank, participating in the banking business, by this very witness. I cross-examined on it.

Mr. BARNES: I cannot redirect on my other matters?

Judge MORAN: Not at all.

Mr. BARNES: Did Mr. Dreyer ever do anything about that banking business?

Which question was objected to by counsel for the defendant.

The COURT: Judge Moran, it strikes me it was you who
353 showed, if I recollect rightly, what the witness' connection with the business was, what his brother's was, and also what Mr. Dreyer's was?

Judge MORAN: Your honor's recollection is at fault. They put Mr. Berger on the stand and asked if Mr. Dreyer participated in the business there; showed where the bank was kept; that he was teller of it; that his brother was the partner, and that Dreyer—the very question was—and I can almost repeat the question—was Mr. Dreyer there, and did he participate in the banking business? He said, Yes. On cross-examination I cross-examined to show his participation. That is all there is in it.

Mr. BARNES: Now, I will ask this question, Judge, to keep strictly within the lines. You asked him if in his absence when he did not draw checks on the account there who did draw them. I will now ask him if Mr. Dreyer did not also perform those duties at times—the same duties that you did and Mr. Berger—that of signing checks at times.

A. Yes, sir; at times, undoubtedly. I don't remember a specific instance, but——

Q. Now, you stated that the drafts of the kind that have been introduced in evidence as State's Exhibit Q were paid by the National Bank of Illinois, even when there was an overdraft of E. S. Dreyer and Company's account there. Is that so?

A. Yes, sir.

Q. Isn't it a fact that they also paid all other checks on
354 accounts in E. S. Dreyer & Company's bank when the overdrafts were there?

Judge MORAN: I object. That is not material, what they did about other checks.

Mr. BARNES: The purpose of this cross-examination on the part of counsel is to make out——

The COURT: I think the question is admissible.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

The COURT: I think the course of dealing between Dreyer and the National Bank of Illinois is admissible under the evidence that has been given.

Judge MORAN: I agree, your honor, that that is correct, but I don't think that Dreyer's bank, with reference to other people, was involved in this case. I will merely save the point on the ruling because I think the general rule is right.

The WITNESS: Yes; they paid all other checks.

Mr. BARNES: The checks on all other accounts in the bank of E. S. Dreyer & Company?

A. Yes, sir.

The COURT: Checks by other parties than the West park commissioners?

A. By other parties; yes, sir.

Mr. BARNES: When their overdrafts were caused in that manner, how was the indebtedness between E. S. Dreyer & Company and the National Bank of Illinois adjusted?

Judge MORAN: I object to that. It doesn't make any di f
355 ference how it was adjusted, they paid all the checks.

Mr. BARNES: I don't want to lead the witness, because he is my witness.

The COURT: "Adjustment" seems to me to be too broad a term. I suppose you mean what was done in the way of book-keeping.

Mr. BARNES: I will withdraw it.

Q. Did Dreyer & Company give notes to the National Bank of Illinois for these overdrafts?

Which question was objected to by counsel for the defendant.

The COURT: I have some doubt about it. He may answer the question.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. Sometimes they did.

Mr. BARNES: How much did E. S. Dreyer & Company owe the National Bank of Illinois on December 18th, 1896?

Judge MORAN: I object to that. Counsel has already gone into that or claimed to have gone into it.

Mr. BARNES: It is drawn out now by your attempting to show——

Judge MORAN: Didn't you go into that yesterday?

Mr. BARNES: No.

The COURT: I think you may answer the question.

A. I don't know the amount.

356 Mr. BARNES: Do you know approximately?

Which question was objected to by counsel for the defendant; which objection was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. I think it was about five or six hundred thousand dollars; I am not——

Q. Was it over $400,000?

Which question was objected to by counsel for the defendant.

The COURT: Can you say that? You may answer the question.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

A. I don't know the exact amount within a hundred thousand dollars.

Q. You don't know within a hundred thousand dollars?

A. No, sir.

Q. Do you know that it was over four hundred thousand dollars?

Which question was objected to by counsel for the defendant; which objection was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. I think it was; yes, sir.

Q. Do you know that it was over five hundred thousand dollars?

357 Which question was objected to by counsel for the defendant; which objection was overruled by the court; to which ruling of the court the defendant, by *its* counsel, then and there duly excepted.

A. I think it was near five hundred thousand dollars.

Recross-examination by Judge MORAN:

Q. Do you know that the National Bank of Illinois had $800,000 collateral for that indebtedness?

Which question was objected to by counsel for the People.

Judge MORAN: You opened the door, my good man.

Mr. BARNES: That would involve going in and testing the value of that collateral. That collateral wasn't worth $200,000.

Judge MORAN: That is false, and you dare not test it before this jury.

The COURT: Judge Moran, what has that to do with this case?

Judge MORAN: This is just exactly the point. Your honor has laid down the rule with reference to this case, the whole dealings of Dreyer & Company's bank with the National Bank of Illinois.

The COURT: Not as to whether they had securities or not.

358 Judge MORAN: I am satisfied, your honor, that the whole dealing has to be gone into.

Mr. BARNES: The dealings as to the checks?

Judge MORAN: Not at all; the whole of the dealings with the National Bank of Illinois. Your honor has permitted them to ask what the indebtedness was.

The COURT: I permitted them to ask what the indebtedness was simply because you claim in your opening argument that really this loss was occasioned because the National Bank of Illinois failed. Now, then, claiming that, it is quite pertinent as to whether the National Bank of Illinois at this time owed Mr. Dreyer or whether Mr. Dreyer owed the bank. Whether they had securities or not is not pertinent.

Judge MORAN: Let's see, your honor. We have claimed that this money wouldn't have been lost except for the failure of the National Bank of Illinois. The National Bank of Illinois had an account with Dreyer, which is protected by those securities. If they hadn't failed they would have kept their account with Dreyer and paid every single dollar of his checks on that collateral. Is a man to be sent to the penitentiary because he has collateral there and understands that it will be overdrawn, and that the bank will pay every check, because the bank fails and is taken possession of by the United

States Government? Will that do it? The whole circum-
359 stance of this deal I want to go in just as it is, and then we will show whether this man has been guilty of a crime or not. You cannot close him out by book-keeping. It is a question of good faith.

The COURT: You cannot close him out by book-keeping?

Judge MORAN: No. His whole relation with this fund—what he did with it, everything about it, why he did it—every one of these things goes to the question, your honor, that he had to pay interest on it under the law—what he did with it, all enters into this crime. You cannot put a man down a narrow line and show a state of book-keeping, and then say because something has happened and because that account was overdrawn and it is not explained—that is why, your honor, every relation between him and the National Bank of Illinois is to be put in here. Suppose, your honor, that he had a deposit in the National Bank of Illinois of $800,000 of United States bonds as collateral security to his account, would your honor say that I could not show that under this state of things? Could I not show that they are in that bank, though the money going in and out and checks going in and out, as shown by a certain statement on the books—that I could not show that I had up against that account there $800,000 in United States bonds pledged, that the bank might sell whenever I failed to make that account good? And if I could do it with United States bonds I could do it with any other collateral I had there, your honor, which the bank took and check upon it.
360 Suppose that a banker says to a man having his collateral up in that way—some day when a man draws a check in good faith on that bank, the banker turns around and says: "I won't pay it. Your collateral is good for nothing." That man may become insolvent on that condition of things, your honor, but he is not guilty of a crime. He is not guilty of a felonious intent. That is why I have a right to show the exact condition of things between E. S. Dreyer, E. S. Dreyer & Company, and the National Bank of Illinois. It is because it is charged that out of that relation grew a felonious act, a felonious intent, a criminal intent, not that they became insolvent. Therefore, your honor, I think every one of these circumstances is to go in, and then you are to instruct this jury, and this jury is to say whether, upon all these facts, on the 19th day of December, there, when this bank shut down and stopped this whole thing, and the collateral and everything else went into the hands of the United States officer, there was a criminal felony committed. That is why I want to go in and see whether this man knew that they had collateral or not.

Mr. BARNES: If the court please, at this time——

The COURT: No; I don't want to hear from you, Mr. Barnes You have admitted that the deficit, the amount which Mr. Dreyer, as treasurer, was owing this park board was $316,000, some $16,000 of that said to be interest. If you will show, or can show, that Mr. Dreyer had at that time $300,000 in the National Bank of
361 Illinois to his credit and was entitled to check against it, I will instruct the jury to find for Mr. Dreyer; that is to say,

the National Bank of Illinois was in good credit—in sound financial standing. That is a notorious fact——

Judge MORAN: I am going to prove that fact.

The COURT: And that he had at the time of his failure $300,000—strike out the interest—if he had $300,000 to his credit in the National Bank of Illinois, so that he had a right to check upon it and could have checked upon it, then I shall consider that this comes within the exception in the statute and instruct the jury to find him not guilty; but if, on the contrary, instead of having $300,000 he really had nothing there, or was overdrawn to the extent of $500,000, even in the shape of accounts or notes, it presents a very different matter. The law requires the treasurer to keep this money. There was a law—it imposes an obligation upon him to pay interest, which the Supreme Court has passed upon and in effect has, as I understand it, declared that it makes no difference as to the obligations——

Judge MORAN: As to his final responsibilities.

The COURT: Well, as to his obligation, whatever it was—his duty, his criminal liability. Now, then, it makes no difference whether Mr. Dreyer has securities there or not, he was bound to be in the position where he had money——

Judge MORAN: I object, your honor, to that statement in
362 the presence of the jury, because I haven't reached it.

The COURT: You have asked me to rule upon it and have asked a series of questions, and I do rule upon it, that you cannot show what securities he had there. The question is whether he had money to his credit so that he could draw, and if he had money to the extent, I will say, of $300,000—you show that and I will instruct the jury to find him not guilty.

Judge MORAN: We haven't got to that point.

The COURT: We are not going into the question whether securities, if any, that he had there were good or worthless or worth $500,000 or $800,000.

Judge MORAN: I don't ask you to do that.

The COURT: Necessarily.

Judge MORAN: There are several expressions before the jury that I want to except to because they are not necessary to the ruling. This witness has been asked with reference to the indebtedness and has answered, over my objection on the ground that your honor stated, that the relations and course of business between Dreyer & Company and the National Bank of Illinois was competent. I agree that that is so. I have no doubt about it. I am confident that that is so. A part of that course of business is, What were the agreements between Dreyer & Company and the National Bank of Illinois—what was their agreement and understanding? This
363 is cross-examination. I haven't got to my case. This is cross-examination, and your honor says I cannot prove that fact now by this witness. I propose to offer that in a different form. I did not suppose I would get to it now, but it is proper cross-examination that the State's attorney ask it.

The COURT: I think not.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES: The check or draft of April 20th, 1896, attached to the special assessment warrant for $1,000, dated September 20th, and which was offered, reads as follows:

It is agreed by both sides it may go in.

"$10,000. CHICAGO, *April 20th*, 1896.

Treasurer of the West Chicago park commissioners,

Pay to the order of E. S. Dreyer & Co. ten thousand dollars.

GEORGE F. TALTY, *Secretary.*

Countersigned and registered.
J. M. OLIVER.

This warrant payable on E. S. Dreyer & Company's bank.
——— ———, *Treasurer.*"

Judge MORAN: We want to prove these various orders, which appear all through every meeting.

Mr. BARNES: I will admit it, and that the form of payment is the same as this just introduced in evidence, certainly.

This voucher admitted by consent is marked State's Exhibit R, and is special assessment warrant number 36, for $1,563.37,
364 dated July 24th, 1894, and addressed to the treasurer of the West Chicago park commissioners, and paid as was the other special assessment warrant testified to by witness Berger, to which is attached a check for the same amount, November 17th, 1896, drawn on the treasurer of the West Chicago park commissioners in favor of E. S. Dreyer & Company, duly signed by the secretary and auditor.

And is as follows:

365 $1,563.37. No. 212.

CHICAGO, *Nov.* 17, 1896.

Treasurer West Chicago park commissioners,

Pay to the order of E. S Dreyer & Co. fifteen hundred sixty-three & $\frac{37}{100}$ dollars.

GEO. F. TALTY, *Secretary.*

Countersigned:
J. M. OLIVER, *Auditor.*

[On the margin:] This warrant payable at E. S. Dreyer & Co.'s bank.

[Stamped across the face in red ink:] E. S. Dreyer & Co., bankers. Paid Nov. 20, 1896.

366 *Special Assessment Warrant.*

$1,563.37. No. 36.

CHICAGO, *July* 24, 1894.

To the treasurer of the West Chicago park commissioners:

From the funds to be realized from the special assessment duly made and levied by the West Chicago park commissioners on the 25th day of November, 1890, and confirmed by the county court of Cook county, Illinois, on the 20th day of April, A. D. 1891, for the purpose of improving Humbolt boulevard, in the city of Chicago, Illinois, but out of no other assessment or fund, on the 24th day of July, 1899, pay R. F. Conway or order the sum of fifteen hundred sixty-three & $\frac{37}{100}$ dollars, with interest thereon, at the rate of six per cent. per annum, payable semi-annually, after the date hereof; which interest is evidenced by the ten coupons hereto attached and numbered from 1 to 10.

The special assessment so made, levied, and confirmed is specially appropriated, set apart, and pledged by the West Chicago park commissioners for paying the cost of the improvement of said Humbolt boulevard, and this warrant is given in payment of part of the work, labor, and material furnished for such improvement.

[OFFICIAL SEAL.] It is hereby expressly agreed by the holder of this warrant that the West Chicago park commissioners shall and do have the right to pay the whole or any part hereof upon any semi-annual interest day after the said 24th day of July, 1894.

CARL MOLL, *President.*

HUGH WILKINSON, *Secretary.*

[Stamped across the face six times:] Paid.

367 No. 36. $46.90.

The treasurer of West Chicago park commissioners

will pay, out of funds realized from the Humbolt Boul'd special assessment mentioned in annexed warrant only, to the holder thereof forty-six & $\frac{90}{100}$ dollars on **10** the 24th day of July, 1899, at his office, being the semi- annual interest on warrant, as numbered above, to which this coupon is attached.

HUGH WILKINSON, *Secretary.*

[Stamped across the face twice:] Paid Jan. 2, 1901.

No. 36. $46.90.

The treasurer of West Chicago park commissioners

will pay, out of funds realized from the Humbolt Boul'd special assessment mentioned in annexed warrant only, to the holder thereof forty-six & $\frac{90}{100}$ dollars on **9** the 24th day of Jan'y, 1899, at his office, being the semi- annual interest on warrant, as numbered above, to which this coupon is attached.

HUGH WILKINSON, *Secretary.*

[Stamped across the face twice:] Paid Jan. 2, 1901.

No. 36. $46.90.

The treasurer of West Chicago park commissioners

will pay, out of funds realized from the Humbolt Boul'd special assessment mentioned in annexed warrant only, to the holder thereof forty-six & $\frac{90}{100}$ dollars on **8** the 24th day of July, 1898, at his office, being the semi- annual interest on warrant, as numbered above, to which this coupon is attached.

HUGH WILKINSON, *Secretary.*

[Stamped across the face twice:] Paid Jan. 2, 1901.

368 No. 36. $46.90.

The treasurer of West Chicago park commissioners

will pay, out of funds realized from the Humbolt Boul'd special assessment mentioned in annexed warrant only, to the holder thereof forty-six & $\frac{90}{100}$ dollars on **7** the 24th day of Jan'y, 1898, at his office, being the semi- annual interest on warrant, as numbered above, to which this coupon is attached.

HUGH WILKINSON, *Secretary.*

[Stamped across the face twice:] Paid.

No. 36. $46.90.

The treasurer of West Chicago park commissioners

will pay, out of funds realized from the Humbolt Boul'd special assessment mentioned in annexed warrant only, to the holder thereof forty-six & $\frac{90}{100}$ dollars on **6** the 24th day of July, 1897, at his office, being the semi- annual interest on warrant, as numbered above, to which this coupon is attached.

HUGH WILKINSON, *Secretary.*

[Stamped across the face twice:] Paid.

No. 36. $46.90.

The treasurer of West Chicago park commissioners

will pay, out of funds realized from the Humbolt Boul'd special assessment mentioned in annexed warrant only, to the holder thereof forty-six & $\frac{90}{100}$ dollars on **5** the 24th day of Jan'y, 1897, at his office, being the semi- annual interest on warrant, as numbered above, to which this coupon is attached.

HUGH WILKINSON, *Secretary.*

[Stamped across the face twice:] Paid.

369 *Humboldt Boulevard Assessment, Div. 2.*

West Chicago park commissioners' special-assessment warrant No. 36 for improvement of Humboldt boulevard, division 2; interest 6 per cent., payable Jan'y 24 and July 24.

In consideration of the issuing of this warrant I hereby, for myself, heirs, executors, and administrators and assigns, accept the same in full payment of the amount therein stated, and relinquish any and all claims or liens I have against the West Chicago park commissioners for the work mentioned therein or for the payment of this warrant except from the collection of the assessment therein named.

R. F. CONWAY.

370 Whereupon the People rested their case, and the above is all the evidence offered, heard, or considered on behalf of said People of the State of Illinois, and thereupon said defendant made the two motions and offered said motions in writing and offered the instruction therein referred to following immediately thereafter, but the court refused each of the same and so wrote upon the face thereof. To the refusal to allow said motions and each thereof, and to give said instruction, said defendant duly then and there objected and excepted.

Said motions and instructions being as follows:

371 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS }
v. }
EDWARD S. DREYER. }

Now comes the said defendant, Edward S. Dreyer, and moves the court to exclude all evidence offered, considered, and admitted in evidence on behalf of said People of the State of Illinois, showing or tending to show what disposition was made by said defendant or E. S. Dreyer & Co. of the $316,013.40 alleged to have been in the hands of said defendant as treasurer of the West park board, and which it is alleged in said indictment he failed to turn over and pay to his successor in office, for the reason that such proof was offered and admitted in evidence for the purpose of showing that the failure to turn over said funds was not occasioned by unavoidable loss or accident, and for the reason that the indictment herein does not allege that such failure to turn over was not occasioned by unavoidable loss or accident.

372 STATE OF ILLINOIS, } ss.
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS }
v.
EDWARD S. DREYER. }

Now comes said defendant, Edward S. Dreyer, and moves the court herein to give the jury the following instruction:

The jury are instructed to find the defendant not guilty.

373 STATE OF ILLINOIS, } ss.
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS }
v.
EDWARD S. DREYER. }

The jury are instructed to find the defendant not guilty.

374 2 P. M.

Court met pursuant to adjournment; whereupon the defendant, to maintain the issues on his part, introduced the following evidence:

JOHN C. MCKEON, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. What is your name?
A. John C. McKeon.
Q. What is your business?
A. I am in the banking business now.
Q. What bank?
A. Commercial National Bank of Chicago.
Q. What position?
A. Vice-president.
Q. Vice-president of the Commercial national bank. Did you know the Illinois national bank?
A. I did.
Q. Did you ever hold any position after the failure of the Illinois national bank in connection with it?
A. I was receiver of the National Bank of Illinois.
Q. Were you the first receiver appointed?
A. Yes, sir.

Mr. BARNES: I object. The appointment is the best evi-
375 dence of the receivership, and when you come to putting that matter in I desire to object to it as immaterial.

Judge MORAN: These are preliminary questions.
The COURT: These are preliminary questions, anyway.
Mr. BARNES: But I should not suppose there would be any purpose in proving that fact in that way.

Judge MORAN:

(Q.) Did you, as receiver, take possession of the assets of the Illinois national bank?

Mr. BARNES: I object. The appointment of a receiver is a matter of record, and before he can be called upon to testify whether he did anything as receiver it becomes a material question in the case whether the appointment of a receiver for the National Bank of Illinois is competent evidence.
The COURT: Well, that may be. Still I think the court has admitted evidence tending to show that Mr. Blount acted as treasurer.
Judge MORAN: Exactly; he has established the rules himself.
The COURT: I think it is competent to show that he acted as receiver.
Mr. BARNES: Well, it is incompetent and immaterial. (To the reporter:) Read the question.
(The pending question was read.)
Mr. BARNES: That is objected to as immaterial, whether he ever did or not.
The COURT: He may answer the question.
Judge MORAN: Answer.

376 A. I took charge as receiver of the assets of the National Bank of Illinois.
Q. When?
A. December 21st, '96.
Q. How long did you continue to act as receiver of the National Bank of Illinois?

Objected to by the State as immaterial; which objection was overruled by the court.

A. Until January 3rd or 4th, 1898.
The COURT: That is something over a year?
A. About a year and two weeks.

Judge MORAN:

(Q.) I will ask you to state when you took possession of the assets of the National Bank of Illinois how much in cash, currency, silver, gold, and cash you found in the vaults of that bank.
Mr. BARNES: That is objected to.
The COURT: I don't see how that is material.
Judge MORAN: We show the money in the National Bank of Illinois. How we will come to show it is our money is another thing. I want to show that the money was in the National Bank of Illinois at the time it failed—what amount of money. I want to

show that it was not a shell; that the money was actually there—any quantity. I will follow that up by showing that the money in the National Bank of Illinois was subject to our draft and disposal at the time it failed.

Mr. BARNES: That's a different matter.

377 Judge MORAN: That is a different matter. I mean to show that the money was there first.

Mr. BARNES: Do you mean to show that there was an absolute title to this money, whatever money there was—absolute title at that time in E. S. Dreyer & Co.?

Judge MORAN: I make my offer of proof. I have commenced on my case.

Mr. BARNES: Then I object to it because the offer does not offer anything material.

Judge MORAN: I am simply offering now to prove what actual cash was in the hands of the National Bank of Illinois.

Mr. BARNES: Well, then, you had better begin at another end of the proposition.

The COURT: I don't see how that can be material.

Judge MORAN: Well, suppose I show this—I propose to show in this case that the money in the National Bank of Illinois, actually there, was subject to the draft of Dreyer, as treasurer, or of E. S. Dreyer & Co.'s check to pay any demand of the West park board. Isn't it proper for me to show what the condition of the bank was in which we put the money at the time it failed? Your honor sees this; here is a question whether this was an unavoidable loss or whether it was an accident that deprived us of the ability to pay checks after the 19th of December. Now, wouldn't it be competent to show that that bank had nothing, that it was insolvent,

378 good for nothing at all? Here I offer to show what I stated to the jury in the opening, that there were over $3,000,000 in actual cash, legal-tender currency, gold and silver in the vaults of the bank when the Government officer took possession of it.

The COURT: Why, Judge Moran, I don't think it is. I think I could go a good deal further than what you say. If anything of this kind is material it is what credit and standing the bank had in the community and what Mr. Dreyer knew about it. Now, then, suppose it had been much more insolvent than it was—that is to say, suppose that it had nothing in its vaults. You say here that it had a very large amount in its vaults. Suppose it had nothing, not a penny, but that it had been in first-class credit and standing in the city among business men, and it had first-class credit and standing, and that Mr. Dreyer had with other men supposed it to be so, and consequently had to his credit there in the bank a very large sum of money. I think all that might be shown. So I think it is immaterial whether it had money in its vaults or not.

Judge MORAN: Very well, wait, your honor. Here is the bank seized by the Government. Now, then, suppose it had been seized for a day or two and then let go again and then demand had been made, could I show money in the bank?

The COURT: I think not. I don't think you are called upon to

show there was money in the bank. I don't think that will
379 be necessary. It is sufficient, in my judgment, if you show that it was in good reputation.

Judge MORAN: Had that reputation?

The COURT: Yes, sir; in good credit and standing, and Mr. Dreyer supposed it to be justly in good credit and standing. I think that is all that will be necessary.

Judge MORAN: Then, your honor, I will make my offer and take the court's ruling. I offer to prove by this witness that when he took possession of the bank and counted the funds, took possession of the cash, that there was, excluding securities, in cash, legal tender, currency, gold and silver, visible gold and silver, upwards of $3,000,000 in the vaults of the company—three and a half millions of money in the vaults of that bank, which came to his hands as receiver.

The COURT: I don't think it is material. The objection will be sustained.

Judge MORAN: Very well. I will save the point upon it.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. Who succeeded you as receiver of the National Bank of Illinois?

Mr. BARNES: I object.

Judge MORAN: I have got the order right here.

The COURT: If you will ask him who acted as receiver——

Judge MORAN: Well, who acted as receiver after you ceased to act as receiver of the National Bank of Illinois?

380 A. General John McNulta.

Q. Is that the same General John McNulta whom we were all pained to learn of the death of yesterday in Washington?

A. Yes, sir.

Q. The same General John McNulta?

A. Yes, sir.

Q. Do you know whether he up to the time of his death continued as receiver of the National Bank of Illinois?

A. He did.

Q. Of course, we only know by general report of General John McNulta's death yesterday?

The COURT: Yes, sir.

Judge MORAN:

(Q.) That's all the way you know it, I suppose, Mr. McKeon—the newspapers?

A. Yes, sir; that's all the information I have on the subject.

Q. Before you became receiver of the National Bank of Illinois were you in the banking business?

A. I was examiner of banks; I was national bank examiner.

(Cross-examination waived.)

381 Judge MORAN: Now, I offer in evidence a certified copy of the order appointing General McNulta as his successor.

Mr. BARNES: I object as immaterial as to who was receiver; there is nothing up to the present time, at least. If it is not material, why should it go in?

The COURT: Well, I don't know.

Judge MORAN: We will show its materiality.

The COURT: It may be of no consequence. I may exclude it hereafter. Unless it leads to something it is immaterial.

Mr. BARNES: Then your honor lets it in at present?

The COURT: Yes, sir.

Mr. BARNES: Subject to any motion to strike it out?

The COURT: Yes, sir.

(The paper was marked "Defendant's Exhibit A," and is in words and figures as follows, to wit:

382 *Certificate for Certified Copy.*

TREASURY DEPARTMENT, } ss:
Office of the Comptroller of the Currency, }

Under the provision of section 884 of the Revised Statutes of the United States, I, Geo. M. Coffin, deputy and acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original commission of John McNulta, as receiver of "The National Bank of Illinois, at Chicago," Illinois, to take effect January 4, 1898, and of the whole of such original on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of February, A. D. 1898.

{ Currency Bureau. } Seal of the Comptroller of the Currency, Treasury Department.

(Signed) GEO. M. COFFIN,
Deputy and Acting Comptroller of the Currency.

383 No. 1867.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *January* 3, 1898.

Whereas John C. McKeon was duly appointed and commissioned receiver of the "National Bank of Illinois at Chicago," located in the city of Chicago, county of Cook and State of Illinois, on the 21st day of December, 1896; and whereas the said John C. McKeon has resigned, to take effect January 4, 1898:

Now, therefore, I, Charles G. Dawes, Comptroller of the Currency, do hereby appoint John McNulta receiver of "The National Bank

of Illinois at Chicago," to take effect on the fourth day of January, 1898, in place of the said John C. McKeon, with all the powers, duties, and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

In witness whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this third day of January, A. D. 1898.

{ Currency Bureau. Seal of the Comptroller of the Currency, Treasury Department. }

(Signed) CHARLES G. DAWES,
Comptroller of the Currency.

384 EDWARD H. HARRISON, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full, please.
A. Edward H. Harrison.
Q. What is your business?
A. I am an accountant.
Q. In what employ have you been up to the present, up till now, for some years?
A. I work on my own account, and also in charge of the accounts of the National Bank of Illinois and the Calumet Electric street railway for General McNulta, who was the receiver.
Q. What experience have you had as an accountant, Mr. Harrison?
A. I have been making special reports for the last six years. Previous to that I acted as auditor and treasurer for various concerns.
Q. Are you familiar with bank book-keeping?
A. Yes, sir.
Q. Thoroughly familiar with it?
A. I think I am.
Q. What institution are you graduated from?
A. I graduated in the United States Naval Academy, at Annapolis, Maryland; graduated in 1881.
Q. Have you examined the National Bank of Illinois, the books, with reference to the account that was kept on those books as the account of E. S. Dreyer & Co.?
385 A. Yes, sir; and I should like to state that I made the examination previous to the time of going into the employ of the receiver of the National Bank of Illinois.
Q. Prior to that you made the examination?
A. Prior to that I made the examination.
Q. Have you had the books under your charge practically since?
A. Yes, sir; ever since about the 10th or 12th of January of this year.

Q. Have you made an examination of the books of E. S. Dreyer & Co.?

A. Yes, sir.

Q. With reference to the account kept thereon in the name of the West park commissioners?

A. Yes, sir.

Q. Have you summarized those accounts?

A. Yes, sir; I made a statement or two statements.

Q. Have you got that statement?

A. Yes, sir; I have copies of it in my pocket.

Q. What did you make the statement to show?

Mr. BARNES: You mean what does the statement show?

Judge MORAN: Yes, sir; what he intended to show by the statement, what it does show.

The COURT: Well, what it does show the statement will show; but what he made it up for I think he may answer.

Judge MORAN: Well, with reference to what did you make up the statement?

A. I made two statements, one statement giving the dates of the deposits of the West park board with E. S. Dreyer & Co. and
386 which appeared on the books of E. S. Dreyer & Co. in their individual ledgers. I made up a statement, tabulated it, of the corresponding dates of the deposits of E. S. Dreyer & Co. with the National Bank of Illinois. I made that up from the individual ledgers of the National Bank of Illinois.

Judge MORAN: Do you want to see the statement?

Mr. BARNES: Yes, sir; let us see what you want.

(The witness hands the paper to Mr. Barnes.)

The WITNESS: Those are my initials on those to verify them. I put the initials on at the time I made the statement, so I could identify it at any time in the future.

Judge MORAN: This statement that Mr. Barnes is looking at, is that a statement from Dreyer & Co.'s books or from the Illinois bank's books or from both?

A. It is both. There is one column giving the dates. The next column shows the deposits on the individual ledger of E. S. Dreyer & Co. by the West park board. The next column shows the deposits of E. S. Dreyer & Co. with the National Bank of Illinois.

Q. Now, were you able to ascertain and does this statement made by you show whether the deposits made by the West park board in E. S. Dreyer & Co.'s were deposited at once in the National Bank of Illinois?

Mr. BARNES: You are asking a conclusion.

Judge MORAN: I am asking him if that is the purpose of it and if that statement shows them.

387 (The question was read.)

Mr. BARNES: I object because if the statement shows it, then, if the statement is material evidence, it will show it.

Judge MORAN: I am not offering the statement at all.

Mr. BARNES: Then there is no object in enquiring.

Judge MORAN: Well, I may offer the statement. It doesn't make any difference. The objection is not good anyway. The purpose of an expert in making a statement——

The COURT: I think the question may be answered. I think he may answer such a question as that—that is to say, it is like stating whether a long account in the books shows such a thing; but, then, the account must come in. That answer is of no consequence unless the account comes in.

Judge MORAN: Exactly. (To the witness:) Well, answer.

A. In all except three or four cases the deposits in the National Bank of Illinois in one item were always sufficiently large to more than cover the deposits of the West park board with Dreyer & Co.

Mr. BARNES: To that I object. That is argument. That is not in response to the question. The question asked, I understand, is whether this statement shows that the identical deposits to the credit of the West park board were deposited on the same day in the National Bank of Illinois.

The COURT (to the reporter): Read the question. (To the wit
ness:) You have not answered the question. (To the re-
388 porter:) Read the question which Judge Moran put.

(The question was read, as follows: "Now, were you able to ascertain and does this statement made by you show whether the deposits made by the West park board in E. S. Dreyer & Co.'s were deposited at once in the National Bank of Illinois?")

Judge MORAN: I will say on that same day.

The COURT: That can be answered by a simple yes, or perhaps one yes and one no.

Judge MORAN: I think, your honor, he has answered. He says with the exception of three or four cases. (To the witness:) Isn't that so?

The COURT: He said more than that—considerably.

Judge MORAN: Perhaps he did say a little more.

The COURT: The answer should be yes or no, or yes or no with some exceptions. (To the witness:) Do you remember the question now?

A. I remember the question, but the thing that appeals to my mind is this——

The COURT: Well, never mind that.

Mr. BARNES: I object to what is in his mind.

The COURT: Answer the question yes or no.

Judge MORAN: I will ask another question. Can you trace in the books and did you trace and show in this statement the items de-
posited or amounts deposited in Dreyer & Co.'s, into the
389 National Bank of Illinois, as shown by the books of the re-
spective institutions?

The COURT: Now, if you can answer that by yes or no, you may do so. It calls for an affirmative or a negative response.

A. Yes, sir.

Judge MORAN:

(Q.) How are you able to trace them in the books?

Mr. BARNES: How is that material? Do you want to introduce this?

Judge MORAN: This is an expert, and I want him to show the jury how he traces it.

Mr. BARNES: Do you want to introduce that in evidence?

Judge MORAN: Do you want to let it go in?

Mr. BARNES: I will agree that the whole account shall go in—the whole account of Dreyer in the National Bank of Illinois and the whole account of Dreyer with the West park board in both books shall go in.

Judge MORAN: Don't let us have any side issue.

The COURT: Were you starting to ask him how he traced it?

Judge MORAN: Yes, sir; as an expert.

The COURT: I don't see how he can answer how he traces it without having the account in evidence, because we are not obliged to take his statement of how he traced it. They may have another expert to do the tracing, and consequently, it seems to me, we must have the account in evidence.

390 Judge MORAN: That can be put in. I have no objection to its being put in at all. Here is a statement made by this expert. It is entirely proper for me to show to the jury how he has put down certain amounts in one place as being in the bank that day, and trace it into the other bank. I am only tracing this account of the West park board in Dreyer's bank into the National Bank of Illinois, and which is the basis of the judgment that I expect to put in evidence.

The COURT: That may be. There is no doubt but what an account may at any time state what the result of his examination of books is. But he cannot state that without the books themselves being in evidence. You must put the account in—you must put it in—it must be in or else he cannot answer the question.

Judge MORAN: You mean I must put in all these large books? What is the use of summarizing? What is the use of an expert summarizing?

The COURT: It is always the case. The expert cannot summarize what he obtains from the books without the books being put in. No one is obliged to take his summary. He may be mistaken.

Judge MORAN: Well, I offer all these books in evidence—the account as contained in the national bank's books and the account as contained in Dreyer's books; that's already in, the Dreyer books.

391 Mr. BARNES: Only parts.

The COURT: Well, you offer the entire account?

Judge MORAN: Yes, sir; I offer the entire account—that is to say, I offer the books showing that account for the purpose of getting at that account.

The COURT: I understand you are asking him for two accounts. I understand you are asking him as to the account which existed in

the banking-house of Dreyer & Co. and also the account which existed in the National Bank of Illinois.

Judge MORAN: Exactly. I offer both books in evidence.

The COURT: Very well, that is what I understand.

Mr. BARNES: You offer both books. You mean both accounts?

Judge MORAN: I mean these two accounts as they appear in both these concerns' books.

Mr. BARNES: In both books?

Judge MORAN: Yes, sir.

The COURT: Yes, sir.

Mr. BARNES: Let us identify both books.

Judge MORAN: You have identified one of them.

Mr. BARNES: Well, I have not identified the other.

The COURT: Let the bailiff bring the books in. (To the witness:) Do they run through all the books?

A. Through all the books of individual account covering the dates.

The COURT (to the bailiff): Bring out such books as the
392 witness may desire to have you bring out.

(Whereupon the witness left the stand to select the books desired.)

393 It is stipulated by and between the respective counsel that said accounts so offered in said bonds may be used in the arguments before the jury, but that the same need not be incorporated in the bill of exceptions herein other than as disclosed by the two abstracts made by the witness Harrison and hereinafter inserted as Defendant's Exhibit- "M" & "N."

394 WILLIAM M. DEVINE, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. MORAN:

Q. Give your name in full.

A. William M. Devine.

Q. Where do you live, Mr. Devine?

A. 289 Huron street, Chicago.

Q. What is your business?

A. Milk business.

Q. Have you held any official position in the city; and, if so, what?

A. Yes, sir.

Q. If so, what was it?

A. City treasurer.

Q. When?

A. 1886 and 1887, I believe it was, or 1885 and 1886.

Q. Do you know the defendant, E. S. Dreyer?

A. Yes, sir.

Q. How long have you known him?

A. Since 1865, intimately.

Q. Since 1865?

A. Yes, sir.

Q. Do you know what his reputation is for honesty in the community?

A. Good, good. His reputation could not be better.

Q. Good?

Mr. BARNES: Well, let the usual answer be given.

Mr. MORAN: Are you going to dictate the form of the answer to the witness?

395 Mr. BARNES: No; I only dictate according to the law. When the law says the answer should be "good" or "bad" I insist that the witness shall answer that way without any homelectics or lectures.

Mr. MORAN: Now, don't you deliver any homelectics or lectures.

Mr. BARNES: I don't want any from you. My place is to obey the court. He did not answer properly. Those two words he had no business to speak.

Mr. MORAN: He had——

Mr. BARNES: He said, "Good; couldn't be better." I say he had no business to say that.

Mr. MORAN: I will take the ruling of the court.

The COURT: The proper answer should be simply "Yes" to the first question, Do you know what his reputation is? And then, "What is it, good or bad?"

Mr. MORAN: Has counsel objected to that question? Let's see, did counsel object to that question—the question I put to the witness?

Mr. BARNES: No; I say I do object. Now, let's go on in the straight way.

Mr. MORAN:

Q. Now, Mr. Devine, do you know his reputation in the community for honesty? The court says you are to answer that yes or no.

A. Yes, sir.

396 Q. Now, what is that reputation?

A. Good.

Cross-examination by Mr. BARNES:

Q. Up to what time was his reputation good?

A. Up to the panic, sir.

Q. Up to the panic?

A. Yes, sir; the last panic.

Q. What has been his reputation since that time, up to the date of the indictment?

Mr. MORAN: What time do you refer to—the panic?

The WITNESS: I refer to the time the bank failed here in Chicago, the last time.

Q. Do you mean the time his bank failed?

A. Bank of Illinois failed, and his bank.

Mr. BARNES:

Q. That was December 19th, 1896?

A. Yes, sir.

Q. Now, do you know what has been the reputation of Edward S. Dreyer in the community for honesty in his dealings since that date and up to the date of this indictment, February 4th, 1899?

Mr. MORAN: I object to that question.

Mr. BARNES: What is the objection?

Mr. MORAN: The objection is that he should state the reputation of the man up to the time they claim this offense was committed.

Mr. BARNES: No; the offense could not be committed until the demand was made. I will make it the date of the demand,
397 up to January 21st, 1899.

A. Well, in answer to that question——

Mr. BARNES: Answer yes or no.

The WITNESS: What is the question?

(The question was read.)

Mr. BARNES: Let me change the question.

Q. Do you know what has been the reputation of E. S. Dreyer, the defendant, for integrity and honesty in his business dealings since December 19, 1896, and up to January 31st, 1899; yes or no?

A. I never changed my opinion.

Mr. BARNES: I didn't ask you that, sir.

The COURT: Answer the question.

The WITNESS: Of my own knowledge, I call it good.

The COURT: Well, the question is whether you know. You should answer yes or no, whether you know what his reputation was for honesty in the community and integrity in the community.

The WITNESS: Your honor, I am speaking now of my own knowledge; not the knowledge of other people.

The COURT: Oh, no; not what you think; that is not the question. You are not asked what you think; but the question is what has been his reputation in the community for honesty, integrity, and uprightness in his dealings up to January 31st, 1899.

Mr. MORAN: I want to save the point on the question, your
398 honor.

The WITNESS: Well, then, your honor, I have to refer to the newspapers and——

The COURT: The first is, do you know? You can answer that yes or no.

The WITNESS: Sir?

Q. Answer yes or no.

A. Well, according to the newspapers, why, I would say it wasn't as good as it was previous, but as far as I am concerned——

Mr. BARNES: No; that is not it, what your opinion is; it is what is his reputation in the community.

A. I am speaking of my own knowledge. I am speaking of my own knowledge, you know.

Q. I am asking you if you know what his reputation was in the community—what people said about him. Do you know what reputation means?

A. Yes, sir; but it was so divided; it was not decided one way or

the other—that is to say, there was one class of citizens thought he was all right and another that he was——

Q. No; I am not asking you about Mr. Dreyer now. I am asking you if you know what reputation means?

A. Yes, sir; I do.

Q. It means, doesn't it, what people say about a man in the community in general?

A. Yes, sir.

Q. Now, I am asking you if you know what was the gen-
399 eral reputation of Mr. Dreyer in the community here in which he lives, in Chicago, up to January 31st, 1899. After December 19th, 1896, do you know what it was, not what you thought, but what was his reputation, do you know?

The COURT: Now that, Mr. Devine, should be answered yes or no.

Mr. MORAN: That is, do you know what people generally said about him?

A. Yes, sir.

Mr. BARNES: Now, was that reputation good or bad?

A. Well, it was both ways, sir, as far as my knowledge is concerned.

Redirect examination by Mr. MORAN:

Q. Well, some people said that he was wrong.

A. Yes, sir.

Mr. BARNES: Now, that is not redirect examination.

Mr. MORAN: Yes; it is.

Q. Some people said it was right.

Mr. BARNES: Wait a minute. I am objecting.

Mr. MORAN: Don't let's have a circus.

Mr. BARNES: There won't be a circus if you will let me object and don't try to pass on it, but if you try to stop my objections and pass on them yourself there will be a big circus.

400 Mr. MORAN: Yes; that's a threat. Now, wait a minute. Your honor, I have a right to prove the character of Dreyer as well as the reputation.

Mr. DENEEN: No; you have not.

Mr. BARNES: No.

The COURT: Ask your question.

Mr. MORAN:

Q. Now, do you know what Dreyer's personal character is for honesty?

To which question the assistants State's attorney objected; which objection was sustained by the court; to which ruling of the court counsel for the defendant then and there duly excepted.

Q. Now, I ask you—you say some people said his reputation was bad after December 19th, and some people said it was good, and you believe it is good?

Mr. BARNES: I object to what he believes.

A. Yes, sir.

Mr. BARNES: I move to strike out his answer.

The COURT: The answer may be——

Mr. MORAN: Now, I want to be heard on that, on this question, before your honor passes on it. You can't make a bad reputation of a man by taking from the time he is accused of a crime down to his trial. When any man is accused of a crime it sets people talking, and they talk about his character. Never talked about before, never questioned before. The man's character for honesty
401 remains. They know he is accused of crime, some people say, "He is accused of crime; he is guilty;" some people say, "I do not believe it; he is honest, straight." That won't do, your honor. If you do that you can take away character at once.

The COURT: What is that question you are talking about?

Mr. MORAN: I say your honor is about to rule that I cannot show that after this accusation was made against him that people still believed, still contended, he was honest—straight.

The COURT: I have not ruled anything of the kind. The question which is before the court before is whether the witness can answer what he thought of him.

Mr. MORAN: I understood your honor had ruled a little bit hastily on it. I could bring authorities, but I am entitled to prove the defendant's character, his character aside from his reputation.

The COURT: What he thinks about it?

Mr. MORAN: No, sir; his character for honesty aside from his reputation. If I had the book here I could call your honor's attention to it at once. Two things can always be done: One is, you can always prove the reputation. Another is that you can prove the character of a man. A man may know a person is honest from his dealings with him without having heard anybody say anything about him, one way or the other.

The COURT: Well, I would like to see that.

402 Mr. MORAN: However, that is all I have got to ask this witness.

Mr. BARNES: That last answer there, was that ruled on?

The COURT: Yes; that last answer there, which was——

Mr. BARNES: I moved what he believed to be stricken out.

Mr. MORAN: Well, let that stand, your honor, until I can bring these authorities.

The COURT: Let it stand, and if it is not proper, then it can be stricken out.

EDWARD H. HARRISON was recalled as a witness on behalf of the defendant, and his direct examination was resumed by Mr. Moran as follows:

Mr. MORAN:

Q. Now, Mr. Harrison, have you got these books?

A. Yes, sir.

(Books were produced.)

Q. Are these the books of the Illinois National Bank containing these accounts?

A. These are the individual ledgers of the National Bank of Illinois, D, E, F, and G, from February 12, 1894, numbered 38 to and including each volume up to 45, being eight volumes in all.

Q. Will you turn to March 6th, 1897——

A. They are labeled on the back, each one.

403 The COURT: Well, those are the books of the National Bank of Illinois?

A. Yes, sir.

Q. Now, what books of E. S. Dreyer have you?

Mr. MORAN: Well, they are already in evidence—already identified.

The COURT: Well, yes. I don't know but, strictly speaking—unless the people are going to care for it—I don't think you should merely say that they are in these books, but you should designate the pages where these accounts are to be found.

Mr. BARNES: That is what I want. (To defendant's counsel:) And let me understand, Judge; have you already introduced the entire account of the West park board?

Mr. MORAN: I leave that account just as you introduced it.

Mr. BARNES: I don't think it was introduced; don't think there is anything in the record—that anything appears from these books, except the balances, which we offer and which you offer, and at the present time the entire account, as an account, does not appear in evidence. At one time, in a cross-examination, I said, "Then we will let in the whole account," but I do not think it appears, as a matter of fact, on the record.

Mr. MORAN: This is, as I understood, that you offered the whole account, and you picked out certain items, which we agreed would be treated as in evidence—all of them. That was my under-

404 standing.

Mr. BARNES: Well, then, let it be understood now. I—just as soon let it go in on my side of the case or on yours—I don't care which—but let it be understood that the entire account of the books of E. S. Dreyer with the West park board is in evidence.

Mr. MORAN: I understood the whole account was put in, and such items as were wanted——

The COURT: Yes, and just so it is understood that the whole account in the National Bank of Illinois is put in, subject to the stipulation with reference to inserting same in the bill of exceptions.

Mr. BARNES: And just so; it ought to be designated as it is in the other book. I have not seen the book. I want to know where the account begins and where it ends.

The COURT: The witness may state on what pages the accounts can be found.

Mr. AUSTRIAN: It is all in that statement.

Mr. BARNES: I just want to see where the dates begin. I may want to cross-examine on this account. Now, just—the account

which you speak of—which you made up from the beginning—begins——

The COURT: Let Mr. Harrison state the pages, so that the jury can hear and the reporters can get it. Don't merely tell it to Mr. Barnes.

Mr. BARNES: Yes. I don't know. Here is the point, Judge Moran, that I want to know. I want to know when the account begins.

405 Mr. MORAN: April 13th, 1894; that is the same time you started.

Mr. BARNES: What I want to know is the date the other started.

Mr. MORAN: April 13th, that is where you started, showing the very same amount.

Mr. BARNES: Very well; where is it, where does it begin?

A. Begin——

Q. On what page?

A. On page 4. And these books are numbered so that there are a number of pages 4 in the book. In other words you can turn——

Mr. MORAN: But under dates.

The COURT: Well, under dates.

The WITNESS: These ledgers are not the ordinary ledgers that are used in commercial business; they are known as bank ledgers, and the account runs across the line instead of down the page, in the ordinary way. Here is "Edward S. Dreyer" printed in here.

The COURT: Yes; it runs across.

Mr. BARNES: Well, this page 4, of date April 14th——

The COURT: Well, set it that way so it can be seen well.

The WITNESS: And each column here is a day, headed and dated.

Mr. BARNES: Now the headings & columns show just exactly as in the other books, the clearings and everything?

A. The same thing.

406 Mr. MORAN: Well, we are going along now a little irregularly. I want to go on now. We have these books and they are in.

The COURT: Well, all there is to it, the witness should explain as to where the accounts can be found, so that another, or anybody representing the people, can find them.

Mr. MORAN: He can do that on cross-examination.

The COURT: Well, that is necessarily a part of your case. When he puts in the books he don't merely put in a great mass of books and say, "The account is in those." No.

Mr. MORAN: Oh, no; he says the account in the book.

Mr. BARNES: Now, it might appear, I think, what books they are.

Mr. MORAN: Well, he has given them—given the numbers to the reporter.

Mr. BARNES: Very well, if they have them.

The WITNESS: I specified the beginning date and the number of each volume and the ending date. It begins with volume 38, on April 13th, 1894, which is the middle column.

Mr. MORAN:

Q. Now, Mr. Harrison, I ask you can you trace, through Dreyer's book, that account of E. S. Dreyer & Company, West park board account, and trace into the National Bank of Illinois the deposits each day made by the West park board?

A. Yes, sir.

Q. Can you, as an expert, trace it?

407 A. Yes, sir.

Q. Now, have you made a statement showing the pages on the Dreyer account—showing the deposits and the pages on the Illinois national bank book—and the dates where you find the deposits carried to the National Bank of Illinois?

A. I have made a statement showing the dates. You cannot give pages in the ledgers, because the account of E. S. Dreyer appears on page 4, and page 4 appears some twenty or thirty times in that ledger. Take D, E, and F, all those names and those pages run from 1 to 22. Then they put from 1 to 22 with the same numbers again—1 to 22, same numbers clear along.

Q. Well, you trace them, then, by the dates?

A. By the dates. The first column on this statement is the date.

Q. Well, now, I will ask you, are you able to trace all the items deposited in E. S. Dreyer & Company by the West park commissioners into the National Bank of Illinois?

A. Not all of them. There were a few items that there was apparently no deposit made of in the National Bank of Illinois.

Q. How many such items?

A. I have a column on the statement marked "Funds of the West park board" which may not have passed to the National Bank of Illinois, and some of them are marked X. Do you wish me to pick out each date through here?

408 Q. No; I was going to ask you what those items aggregated altogether, what number of them is there?

A. Six or seven or eight; they amount to a couple of thousand dollars or more—three hundred thousand dollars, probably. The figures are here and can be footed. I have not them footed.

Q. These are all shown on this statement that you have made?

A. Yes, sir.

Q. You made this statement as carefully and accurately as you could from these books?

A. As accurately and carefully as possible. I verified it two or three times myself, the figures.

Mr. MORAN: Well, I offer the statement in evidence now.

409 Q. You have another statement, Mr. Harrison?

Mr. BARNES: Wait a minute; I object to this statement for this reason——

Mr. MORAN: Wait a minute. I want to get through with the other statement first.

Mr. BARNES: You don't offer this now?

Mr. MORAN: Consider it offered and deal with it afterwards.

Q. You have another statement; what is that?

A. (The witness produced a document.) This is a statement that is dated on March 30th, 1896, beginning—in one column I have 'receipts from sale of West park bonds;" another column, "checks and warrants of the West park board on E. S. Dreyer & Company," and the balance of the West park board with E. S. Dreyer & Company at the same date, and the balance of E. S. Dreyer & Company in the National Bank of Illinois on the same date; they run across by dates.

Q. (Indicating.) This is the bonds and the warrants? It is the bonds, the receipt from bonds, you say?

A. Receipts from sale of bonds of the West park board.

Q. Now, did you trace those into the books of the National Bank of Illinois?

A. Yes, sir.

Q. I find on the 1st here, under date of April 1st, there is an amount there; what is that amount? State the amount.

A. $233,700, which was money credited——

Mr. BARNES: What does it show? What are you trying
410 to get at, the general character of the——

Mr. MORAN: No; the first item.

The WITNESS: The item $233,700, April 1st, was a credit on the books of the National Bank of Illinois to E. S. Dreyer & Company for the sale of bonds to the West park board.

Mr. BARNES: April 1st, what year?

The WITNESS: 1896.

The COURT: What date did you say, 1896?

A. April 1st.

Mr. MORAN:

Q. Well, now, you follow that across the column and tell us what it means there, what the next means.

Mr. BARNES: Well, it don't seem to me that that is just the way that you want to get this in evidence.

Mr. MORAN: I want to see what these different columns mean.

A. The next column there shows $1,328.93, the payments shown on the books of E. S. Dreyer for checks and warrants of the West park board.

Q. On that date?

A. On that date; leaving a balance to the West park board on the books of E. S. Dreyer & Company of $331,520.94.

Q. Now, how much is in the National Bank of Illinois?

A. $268,833.08 was the balance of E. S. Dreyer & Company on the books of the National Bank of Illinois.

Q. On that date?

A. On that date.

Q. Well, now, is that paper that you have there—are all
411 the other items carried along there as you have given this first one?

A. Yes, sir.
Q. Showing the proceeds of bond sales?
A. Yes, sir.
Q. Is that all that it contains, just what you have described?
A. Yes, sir.

Mr. MORAN: Well, I offer that paper in evidence, being Defendant's Exhibits M & N, hereinafter set forth.
The COURT: You offer the two?
Mr. MORAN: Yes; I offer the two.
Mr. BARNES: Now, let me see. Is this all or have you other papers to offer?
Mr. MORAN: That is all with this witness.
Mr. BARNES: Well, have you other papers to offer on this account?
Mr. MORAN: No.
Mr. BARNES: I object to the introduction of the first paper for this reason and this only. It is taking out part of the account which is already in evidence and showing the deposits to the deposit of the West park board in Dreyer's bank, and then the deposits of that same day to the deposit of E. S. Dreyer & Company in the National Bank of Illinois. It does not show what is drawn out; it merely shows his deposit; it shows no balances of the account. Now, the book itself, as I understand it, shows all these deposits. This book shows the deposits in the National Bank of Illinois. These books (indicating) show the deposit in the West park
412 board. Is that right? Now, what is the purpose of duplicating this evidence? If they want to make a transcript of the entire account, showing both the deposits and what was drawn out and the balances each day, and showing how much Mr. Dreyer was overdrawn on the days he was overdrawn, and how much on the same day he owed in the West park board, in his own book, I have not the slightest objection, if they want to do that, but picking the account out and introducing that when it is already in evidence, they have got it in evidence; they can use it as an argument, if they want to, but it is not a matter to go before the jury. In other words, it is like something that is in evidence already, take out certain portions of it and let the jury examine portions without examining the rest. Now, what he purposes to offer is already in evidence; he cannot get it any more in evidence, possibly. Now, if he wants to dwell upon those special features, he can do that when he makes his argument, but it is not proper for the jury to handle when the jury have the books. There is where the facts are, in the books. The same as to the other paper, the same objection. In other words, I might go to work and make up a statement to show that he had particular balances on particular days, particular overdrafts on particular days, and introduce that to the jury. What would the jury have before them? They have a list. There are certain days where
413 there are overdrafts. They know nothing else about the account. Now, if counsel desired to have it in more convenient form than it is in the book, to introduce a transcript of what the books show, I have not the slightest objection, but to select parts of

it out and dump it in before the jury as an argument when the jury can determine the facts from the entire books and the entire account is not regular, and I object.

The COURT: Well, it is true that the account is already in.

Mr. MORAN: Certainly.

The COURT: But it appears that this expert here has not made a transcript or a summary of the entire account, as I understand—that is, he has not made a summary of the account drawn out, and therefore his statement here does not show the balances.

Mr. MORAN: Yes; it does, your honor.

Mr. BARNES: Show the overdrafts?

Mr. AUSTRIAN: National Bank of Illinois; yes.

The WITNESS: Shows the balance. Whether it is debit or credit it shows.

The COURT: Well, whether it does or not I think that a party has a right to have such a summary made of the account as he sees fit—that is to say, in having a summary made he is not obliged to have a summary showing the entire account, but he may have a
414 summary made of certain portions of the account—of certain features of it.

Mr. MORAN: Yes; as long as the whole account is in he can use it for any purpose.

Mr. BARNES: Then we can introduce some of it?

The COURT: Certainly; no doubt about that.

Mr. MORAN: All you want.

The WITNESS: May I make a statement about those?

Mr. MORAN: About these papers?

The WITNESS: Yes.

Mr. MORAN: Anything to make it more clear to the court and jury.

The WITNESS: I want to state that the accounts here on this statement of deposits show the account every time that there was a deposit of the West park board with E. S. Dreyer & Company, but the account of E. S. Dreyer & Company was simply supplementary to the account of the West park board.

Mr. BARNES: I want to cross-examine as to those summaries.

Cross-examination by Mr. BARNES:

Q. I hold in my hand, in the first place, your summary of the receipts from bonds, checks upon—checks and warrants of the West park board on Dreyer & Company, and the balances in each bank on certain days, beginning with March 30th. Your first item
415 is "receipts from sale of bonds of West park board, $233,700." How do you know that is a receipt from sale of bonds?

A. I got that information from—I believe it was an exhibit or a bill that was filed by the West park board in the case against the receiver.

Q. Then you didn't get it from the books?

A. The amount——

Q. Answer the question. Did you get it from the books?

A. Not that it was from the receipts from the sale of bonds.

Q. Did you get it from the books? Very well. Now, under June 29th is another item of $354,160. Did you get that from the books—that it was proceeds of the sale of bonds?

A. No, sir.

Q. You got that information from somebody else, somewhere?

A. Yes, sir.

Q. That is the fact, then, in regard to all of these items? In regard to the receipts of the sale of bonds, you did not get one of them from the book?

A. No, sir. There are three items there.

Q. Now you have got in the next column—"Checks and warrants of the West park board on E. S. Dreyer & Company." How do you know they were checks and warrants of the West Park board?

A. A bank pays out——

Q. Oh, no. Well, go on, go on.

416 A. Pays out moneys on a check, warrant, or receipt, and it charges that in its column for checks.

Q. Yes. Now, let me ask you this question: Do you mean to say that these figures that you have got under that heading, "Checks and warrants of the West park board of E. S. Dreyer & Company," represented checks of the West park board and not drafts on E. S. Dreyer, treasurer of the West park board?

A. I know nothing about the form of the check.

Q. Then that is merely a convenient heading you have got to designate what was drawn out of the account of the West park board?

A. Oh, certainly.

Q. You don't know who drew it out? Have you any personal knowledge of that?

A. No.

Q. Did you see the checks?

A. No.

Q. Could you tell, for instance, whether—I show you an exhibit in this case, being State's Exhibit R, State's Exhibit Q, being a draft on the treasurer of the West Chicago park commissioners. Can you tell from the looks of that whether it was drawn out of this account or not (paper shown witness)?

A. No; and I could not probably identify the individual check in the account. It came through the clearing-house.

Q. Then, what you have designated here under the heading of checks and warrants of the West park board, you don't know whether they were checks and warrants of the West park

417 board or not, do you?

A. They were checks and warrants charged to the account of the West park board; that is all I know.

Q. Yes; that is all you know?

A. That is all I can tell.

Mr. MORAN: He summarized the books.

The WITNESS: I only know what the books bear on the face of them.

Mr. BARNES:

Q. Well, the books don't tell you whether it is a check or a warrant or a draft, do they?

A. No, sir.

Q. And it doesn't tell you who the check, warrant, or draft was on, does it?

A. No, sir.

Q. It simply shows the amount taken out of the account.

A. Taken out of the account.

Q. And you infer that that must be from warrants or checks or drafts, and, so inferring, have put the figures under such a head. Is that right?

A. Yes, sir.

The COURT: Let me ask.

Q. You have certain headings for those columns there?

A. Yes, sir.

Q. Are those headings in the books from which you made out these summaries?

A. No, sir; not as I have it.

Q. That is a heading which you have designed yourself?

A. Yes, sir.

418 Q. Not in the book?

A. No, sir. I can give you the headings from the books.

Q. Yes, and that is true as to the various headings, I suppose?

A. Yes, sir.

Mr. BARNES: Now, you were asked to explain the first—withdraw that. The next column is, "Balance West park board with E. S. Dreyer & Company," beginning with March 30th and running down for various dates down to December 19th. Now, those are the balances of the credits to the West park board as it stood on the books of E. S. Dreyer & Company on those dates.

A. Credits or debits? When there was a credit it showed, but you will find when there were overdrafts, and it was a debit charge—you will find a dash in front of it like a minus mark.

Q. There never was an overdraft of the account of the West park commissioners, was there?

A. I think not.

Q. Well, you look and see if you have any overdrafts of the West park commissioners?

A. Not on this statement.

Q. Now, I notice on the next column is a balance, E. S. Dreyer & Company with the National Bank of Illinois—those balances were taken from the balances of the National Bank of Illinois, the account of E. S. Dreyer & Company?

A. Yes, sir.

Q. And I notice that you have dashes in front of a great
419 many of those items. What do those dashes indicate?

A. That is an overdraft.

Q. Overdraft?

A. Charges to Dreyer & Company.

Q. Have you got anything here to show—for instance, now, I notice you have here, under date of June 27th, $220,000—no; June 29th—a credit to the account of the West park board in the bank of E. S. Dreyer & Company of $575,104.87. Now, what I understand you to say is that that money went into the account of E. S. Dreyer in the National Bank of Illinois—you traced it in there?

A. That was the balance accumulated, and those items that had gone to make up that balance in times past had gone to the National Bank of Illinois.

Q. That is true. Now, on that date was deposited, you have got here under the head of bonds, $354,160?

A. Yes, sir.

Q. Do you say you traced that into the account?

Mr. MORAN: In what account?

Mr. BARNES: The account of the National Bank of Illinois.

A. Yes, sir.

Q. Will you tell me how it was that after tracing that into the account that there was left in the account on that day $232,916.83?

A. If you will look at the line above there you will see the balance under the heading of the National Bank of Illinois—you will see the balance they had on the day previous. Will you tell me what that is?

420 Q. That is an overdraft $118 907.08?

A. Well, practically speaking, if you will take that from the amount of the bonds, you will find the balance.

Q. Yes. Well, now, you take it and see if you find it.

A. Barring a small amount, $118,000 from $354,000 makes $232,000. That fixes the thousands. The hundred, the odd hundreds——

Q. Well, you have got it balanced in—a balance in of $575,000?

A. That is in the West park board.

Q. Yes; West park board.

A. Yes; that was the balance of the West park board——

Q. Now, I understand you to say that all these moneys, this $575,000, went into this account?

A. Yes.

Q. Went into this account in the National Bank of Illinois?

A. Yes, sir.

Q. Do you know why when $575,000 stood to the credit of the West park board in the bank books of E. S. Dreyer & Company, and all the money went into these books, that the same amount did not stand there instead of being short two or three hundred thousand dollars? Do you know that?

Mr. MORAN: He has told you.

Mr. BARNES: Let him answer.

The COURT: He may answer the question.

A. There are two separate accounts. The account of E. S. Dreyer

& Company in the National Bank of Illinois was checked on
421 and used in one way, and the West park board was a separate account in the bank of E. S. Dreyer & Company. In the sense of one balancing the other or equalling the other they never did and never would.

Q. Never would. Now, will you answer this question: If Mr. Dreyer's moneys that were received in the bank of E. S. Dreyer & Company were credited there, and the cash was taken over and put into his account in the National Bank of Illinois, will you tell me, if you can, why it should not be there, instead of being short two or three hundred thousand dollars, if the West park board had $575,000 to its credit? Wouldn't it—don't you know, as an expert, that it would be because it was checked out of that account for some other purpose than the West park board Isn't that a fact?

A. Certainly.

Q. Did you observe this: That the amounts checked out of the account of the West park board, as they appeared in the account, that account in Dreyer's bank, never reduced the credits that stood in that account, to the credits that stood to the account of E. S. Dreyer & Company in the National Bank of Illinois?

A. I cannot say whether there was one instance of that kind or not. The rule is that the statement shows that the balance of the West park board with E. S. Dreyer & Company ruled larger than the balance of E. S. Dreyer & Company with the National Bank of Illinois.

422 Q. Yes. Now, I will ask you this as an accountant: Isn't it a fact that wherever there was an overdraft—that all the time there was an overdraft on the account of E. S. Dreyer & Company, in the National Bank of Illinois, there still stood a credit to the West park board in Dreyer's books?

A. Yes, sir.

Q. Do you know where the money went to, as an accountant?

A. You mean where the money in the national bank——

Q. Yes; where that money that stood credit in Dreyer's books went to when you say it all went into these books, when there were overdrafts many times here, for days and months?

A. There was the payment of checks and warrants of all kinds, including the West park board's checks and warrants on the National Bank of Illinois, on E. S. Dreyer & Company.

Q. Yes; in other words, E. S. Dreyer & Company had paid out of its account in the National Bank of Illinois on all checks the moneys that belonged to the West park board?

A. On all checks, including West Park Board checks?

Q. Yes.

A. Yes.

Mr. BARNES: Now, with the exceptions of your headings, your honor, so that it won't mislead, the balances are right?

The COURT: He says those are the headings——

Mr. MORAN: He makes the statement that some of them
423 are just the same as in the books. You will see the balances on the book.

Mr. BARNES: Is the heading total checks here?

Mr. MORAN: You will find all the headings—total checks, balance. He has got balance, but he makes a summary.

The WITNESS: The statement was that the payments made by the West park board were not checks in the sense—that is, just in ordinary banking parlance. They were warrants, and coupons, and bonds, and anything. I simply adopted that because I wanted to make it comprehensive enough, so that there would not be any dispute on its being checks.

Mr. MORAN (to the assistant State's attorney): Well, you say you are willing these should go in evidence?

The COURT: Oh, they have been admitted, both.

Mr. MORAN: They are both admitted?

The COURT: Yes.

Mr. BARNES: Now, let's see. This begins April 14, 1894, the date the account was opened in the bank of E. S. Dreyer & Company with the West park board. I think it is the West Chicago park commissioners—something like that.

Q. Now, I will ask you: In this other account that you figured up it is headed "deposits"?

A. Yes, sir.

Q. The first column were the deposits that were made
424 from the time beginning April 14, 1894, in Dreyer's bank to the account of the West park board?

A. Yes, sir.

Q. Have you got them all in there?

A. All deposits made by the West park board with E. S. Dreyer & Company are in that column, with their dates.

Q. They are taken right from the books?

A. They are taken from the books of Dreyer, 11, 12, 13, and 14.

Q. Now, the next are deposits in the account of E. S. Dreyer & Company with the National Bank of Illinois?

A. Yes, sir.

Q. Now, this account begins April 13th——

A. Isn't that April? Yes, April 13th, it begins there. Here it is.

Q. Now, there is the item, $255,856.87. Now, you infer, do you, that because that is larger than the deposit of $249,000, made the same day in Dreyer's bank, that it is included in that?

A. Yes, sir.

Q. Then it includes not only that deposit, but something else?

A. Enough to make up the difference.

Q. Then *does* Dreyer, when he made a deposit in that bank, not only deposited this $249,000 that belonged to the West Park Board account, but he deposited some other moneys?

A. Yes, sir; and he made two or three other deposits on that day, if you notice.

425 Q. No; he only—yes, yes; you are right; he made four deposits that day.

A. As a rule, he made several deposits each day.

Q. Now, do you know where all these deposits came from that

went into the account of E. S. Dreyer & Company with the National Bank of Illinois?

A. No; they came from the business of E. S. Dreyer & Company.

Q. In other words, all of Dreyer's customers that deposited moneys in his bank, he took those moneys over and deposited in the National Bank of Illinois, in his name there—E. S. Dreyer & Company?

A. Barring that small cash in the drawer; yes, sir.

Q. He kept some in his own bank to do business on?

A. Yes, sir.

Q. And some he drew at the bank from time to time to do business on?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. In other words, in his account here E. S. Dreyer & Company has mixed with the West Park Board account all the other accounts?

A. All checks that Mr. Dreyer took he would deposit in the National Bank of Illinois.

Q. And he owed, did he, as a banker, all of these deposits, including the West park board, to all of his depositors?

Mr. MORAN: I object. No one can tell that.

The COURT: Well, if he can tell——

426 Mr. MORAN: He is speaking about the books. The books show——

The COURT: Well, I say, exactly. (To the witness:) If the books show and you could tell, you may answer.

A. No; I could not tell.

Mr. BARNES:

Q. Could not tell that?

A. No.

Q. But so far as he put depositors' accounts in there, we all know that he owed them, do we not? Do you know of what these deposits were made up?

Mr. MORAN: He has already answered, from the business of E. S. Dreyer & Company.

427 Q. Could you distinguish in this account of Dreyer & Company in the National Bank of Illinois what deposits there belonged to other customers besides the West park board?

Judge MORAN: You mean could he if he had the opportunity?

Mr. BARNES: Can he while looking at the books?

A. By taking Dreyer's books of his customers' accounts and taking all the credits to those customers each day I haven't any doubt that you could verify the account in the National Bank of Illinois. It would be a long and tedious process.

Q. Supposing there was paid out some moneys from his own

counter in his own bank, how could you tell the moneys he paid out?

A. I barred the question of the small amount of currency that he took in and paid out.

Q. You couldn't, then, designate from a certain date here and tell whether the deposits made on that day—whether the moneys belonged to one of his depositors or another, could you, by looking at the books themselves?

A. The money in the National Bank of Illinois?

Q. Yes; belonged to any particular depositor in Dreyer's bank unless it exactly corresponded.

A. You would draw the inference if you could make the matter fit——

Q. I will ask you right here——

428 A. And join it together.

Q. Whose money was that $4,857 deposited in this account on April 13th, 1897?

Judge MORAN: He hasn't looked to find out.

The WITNESS: I don't know anything about that.

Q. You don't know?

A. No.

Q. Do you know whose money *if* the $5,758 was?

A. No, sir.

Q. Do you know whose money the $205,856 was?

A. I drew the inference it was the West park funds.

Q. To the amount of what—what they deposited that day?

A. What they deposited that day.

Q. You drew that inference because he had deposited that amount of money in the National Bank of Illinois?

A. And——

Q. Some more?

A. No—and the moneys of the West park board were deposited principally in the form of check, which must go to the National Bank of Illinois.

Q. Weren't the moneys of other creditors, depositors, deposited principally by checks?

A. Yes, sir.

Q. Then that went also to the National Bank of Illinois. Isn't it the fact that the National Bank of Illinois collected every check of Dreyer's?

A. And paid every check?

Q. Yes.

A. Yes, sir.

Q. Every one of the customers?

A. Certainly.

429 Q. Therefore this account of E. S. Dreyer & Company does not distinguish that at all as the account of the West park board, does it?

A. Not to my understanding of it.

Q. Then you merely draw the inference when you found that certain amount deposited the same day to the credit of the West park

board in Dreyer's bank, if you found that same amount or more money deposited to the account of E. S. Dreyer & Company in the National Bank of Illinois—you inferred that that money there went over here?

A. If one individual deposit on the day was large enough to include the check of the West park board I drew that inference.

Q. We will find here deposited on this very next day in the bank of Dreyer to the credit of the West park board $366.90. You don't find that exact deposit, do you, in the National Bank of Illinois to the credit of E. S. Dreyer & Company?

A. No; I find one of $4,900 and one of $5,500.

Q. Do you know what that $4,900 was made up of?

A. No, sir.

Q. You infer that that includes the $366?

A. In one of those deposits.

Q. And that is the way you have made up this account?

A. Yes, sir.

Q. There are some things you seem to be uncertain about.
430 You have a column, funds of the West park board which may not have passed to the National Bank of Illinois?

A. Yes, sir.

Q. That is guessing, is it?

A. What?

Q. You guess at that, do you, this column?

A. That column which may not have passed?

Q. Yes.

A. Let me find the item and I will explain.

Q. Do you know whether it did or not?

Judge MORAN: That is what he says in his statement.

The WITNESS: It says on the statement; don't know.

Mr. BARNES: Then you are guessing at it, are you?

A. I am not guessing at all. I say I don't know anything about it.

Mr. BARNES: Well, then, let's have it stricken out of the account.

Judge MORAN: Not at all. Here are items that he is not able to trace like the other items.

The COURT: It is his inference. He says funds which may not have passed.

Mr. BARNES: I want that column stricken out.

Judge MORAN: All right.

The COURT: What column?

Mr. BARNES: Funds which may not have passed to the National Bank of Illinois.

(And said column was thereupon stricken out.)

Q. Now, Mr. Harrison, in examining the entire account
431 from April 13th, 1894, did you find in the books of the National Bank of Illinois an account of E. S. Dreyer, treasurer?

A. Yes, sir.

Q. Will you turn to that account?

Which question was objected to by counsel for defendant as not cross-examination.

Mr. BARNES: It is cross-examination this way: I purpose to show this—that there is a third account that contains the very same moneys—third account.

The COURT: If that is one of the accounts which you examined, I think you may be cross-examined as to it. Is that one of the accounts you examined?

A. I did not examine it for this report; at the request of Mr. Austrian.

Mr. BARNES: You say you made an examination of those matters before you were connected——

A. Yes, sir. I made this examination at the request of Mr. Austrian in August, last year, and I became connected with the National Bank of Illinois on the 10th of January of this year.

Q. I will ask you to look at that account of E. S. Dreyer, treasurer, in the National Bank of Illinois.

Judge MORAN: That is objected to. There is no pretense about it; it is only taking up time.

Mr. BARNES: There is a pretense.

Judge MORAN: There are a good many pretenses on your side.

432 Mr. BARNES: I am going to substantiate them, too.

The COURT: It seems to me that the account of Mr. Dreyer, which he found in the bank—National Bank of Illinois—he may be cross-examined to find out what relation that has to the accounts of which he has made a summary.

Judge MORAN: Is it cross-examination at all? Here is a witness put on who examined the account of E. S. Dreyer & Co. His attention is then directed to the account of E. S. Dreyer & Company with the National Bank of Illinois. That ends it, doesn't it?

The COURT: On cross-examination he may be asked about any accounts which have relation to any accounts which he has testified about. It seems to me the account of E. S. Dreyer, treasurer, running through the same period of time has a relation.

Judge MORAN: It doesn't run through the same period.

The COURT: It runs through the same period of time, I take it, as the books of the Dreyer Company.

Judge MORAN: Part of the time.

The COURT: I mean a portion of the time.

Judge MORAN: That doesn't enter into the National Bank of Illinois books at all.

The COURT: It is the account in the name of E. S. Dreyer, treasurer, and upon one or the other of these books which he has examined and for a portion of the same period of time which he has examined.

433 The WITNESS: But I made no examination of E. S. Dreyer's account. I know it is there because if you will

turn to Book 39 you will find the name of Edward S. Dreyer printed there.

Q. You look at the account of E. S. Dreyer, treasurer, in this book where it begins.

Which question was objected to by counsel for the defendant.

Mr. BARNES: The witness has been called here to testify to the fact that the deposits were made in the account of E. S. Dreyer & Company, beginning April 13th, 1894; that he had been able to trace the deposits directly from Dreyer's bank into this. I propose to show on the cross-examination that instead of all of them going into that they went into the account of E. S. Dreyer, treasurer, and from the account of E. S. Dreyer, treasurer, went into the account of E. S. Dreyer & Company; in other words, that the money of E. S. Dreyer, treasurer, was borrowed from E. S. Dreyer & Company from that account and put into this account.

The COURT: It is very likely that you may show that, but when this witness states that he hasn't examined that account and doesn't know what it contains——

The WITNESS: It is on the line above and on the line below.

Q. Did you examine the account?

A. No, sir.

Q. Did you take it into consideration in making up your
434 summary?

A. No, sir; I wasn't interested in it.

The COURT: It doesn't seem to me that the cross-examination on that point is proper.

Mr. BARNES: He comes in as an accountant and pretends to say that the identical credits in these books of Dreyer & Company he can trace in these books. Now I propose to direct his attention to another account and ask him if he doesn't know it as a fact that the moneys in that account, taking the three together, if it doesn't show that the moneys were taken from that account into this and not the account of the West park board.

The COURT: The objection I see is this: No man with such a lot of books as that, however much of an accountant he may be, can come into court and state what a long account shows without his having examined it. This account he says he hasn't examined. I don't see any reason why you shouldn't have it examined, but it seems to me to ask this witness now we will take up a great deal of time with what is in the account which he says he never examined. The purpose of an expert is to abbreviate things.

Mr. BARNES: I haven't put him on.

The COURT: If he had made any examination of that account—if the summaries which he has produced here were made up at all from the examination of that account, then you might ask him. It seems to me you might ask him why he didn't examine the
435 account. I don't think you can show by him what is in that account now. It takes up too much time.

Mr. BARNES: It is cross-examination in this way: The witness is put on for the purpose of introducing in evidence a sum-

mary. He is competent to make a summary because he is a competent accountant. He says, as an accountant, "I know when I made up this summary that the moneys in the West Park Board account went right over directly into the account of E. S. Dreyer & Company." Now, I cross-examine him and call his attention to another account and say, "Are you sure about that? May they not have gone into this account of E. S. Dreyer, treasurer, and from that in here?"

The COURT: It is a matter of time. I think you may let the witness go — and ask him to examine that account. It seems to me we are taking time unnecessarily.

Mr. BARNES: I don't propose to go through the account only for the purpose of calling the attention to the account in the first two items.

The COURT: Well, do that.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES: Turn to the account.

A. Will you tell me when the account of Edward S. Dreyer was opened?

Q. I can tell you in a minute. It was opened April 14. Look at the account of E. S. Dreyer, treasurer, April 14th, 1894, in the
436 volume you have been looking at, beginning with the deposit of $199,024. Now, can you say whether that $199,024 is included in the deposits of $249,024.75 deposited in the bank of E. S. Dreyer & Company to the credit of the West park board on April 13th?

A. On April 13th there shows a deposit of Edward S. Dreyer & Company on these books of $255,000 and in that book of $249,000 of the West park board. If you will look on the next day, under the head of the spindle, you will find check charged to Edward S. Dreyer & Company of $199,024, and a like amount credited to Edward S. Dreyer, treasurer, of $199,024. I would draw the inference that that was the same check. I think if I can turn to that book in the West park board I can probably find them charged——

Mr. AUSTRIAN: Just do that.

Judge MORAN: There isn't any mystery about it.

The WITNESS: These may not have gone through this book. It may be simply separating the account on this book.

Mr. BARNES: It is perfectly apparent, isn't it, that this item, $199,024, of E. S. Dreyer, treasurer, was drawn out of the account of E. S. Dreyer & Company in the National Bank of Illinois?

A. I should say so; probably a check of E. S. Dreyer & Company to the order of E. S. Dreyer, treasurer.

Q. Turn to where the account goes.

A. Turn to page 21 and you will probably find it. In the
437 next book we will find it printed in the regular order.

Q. Turn to where it goes.

A. Here it is (indicating).

Q. What is the date?

A. That is the date of April 23rd, and shows balance brought forward. There are no other deposits there for a long time; no more deposits in that week.

Q. Were there ever any more deposits there?

A. I don't know; 21st—I go to the 30th.

Q. Turn to June 20th of the same year.

A. June 20th, there is a deposit of $50,000; E. S. Dreyer, treasurer, $50,000.

Q. Look and see where that deposit comes out.

A. There is a check charged against Edward S. Dreyer & Company of $50,000 on that day.

Judge MORAN: That is in the account of Edward S. Dreyer, treasurer?

A. Edward S. Dreyer & Company had a check charged to them of $50,000 and E. S. Dreyer, treasurer, had a credit to his account of a like amount.

Q. Turn to July 17th of the same year, 1894.

A. Now you will find the two accounts here together, Edward S. Dreyer & Company, and is followed by E. S. Dreyer, treasurer.

Q. Two distinct accounts?

A. Yes, sir; one follows the other, and that is why I know about it.

438 Q. What is the balance of that account of E. S. Dreyer, treasurer, on July 17th?

A. I simply explained that this account of Edward S. Dreyer & Company was followed by E. S. Dreyer, treasurer.

Judge MORAN: That is why you saw that account?

A. That is all I know about it.

Mr. BARNES: Look at the account now of E. S. Dreyer, treasurer, on July 17th. What is the balance there that day?

The COURT: July 17th—what year?

Mr. BARNES: 1895.

Q. Have I got you 1894?

A. This is July, 1894.

Q. 1895 is the one I want. I misled you.

A. July, 1895?

Q. Yes.

A. July 17th, 1895, $908.29.

The COURT: I don't understand.

The WITNESS: $908.29 is the balance of E. S. Dreyer, treasurer's account on the 17th day of July.

Q. In the National Bank of Illinois?

A. Yes, sir.

Mr. BARNES: Look at July 18th.

A. The same amount, $908.29.

Q. Now look and see if that amount was not transferred on that date to the account of E. S. Dreyer & Company?

Judge MORAN: Of course it was.

Mr. BARNES: You admit that?

Judge MORAN: Certainly.

439 Mr. BARNES: It is admitted that that amount, $908.29, was transferred that day from the account of E. S. Dreyer, treasurer, to the account of E. S. Dreyer & Company, and that the account was closed.

Redirect examination by Judge MORAN:

Q. Mr. Harrison, you are asked by Mr. Barnes what you inferred from the facts that the balances in the National Bank of Illinois were sometimes considerably less than the West Park Board accounts in E. S. Dreyer & Company's bank. I will ask you isn't it the proper inference that the money was being used by E. S. Dreyer & Company?

A. Yes, sir.

Q. Being used—they had used the money?

A. Yes, sir; I think my answer stated that.

Q. Yes; I know; but Mr. Barnes wanted it in other verbiage. I wanted it that way. With reference to these bond sales, Mr. Barnes asked you if you didn't just guess at this. Did you find these figures in the books?

A. The figures are in the books, and I examined, as I told Mr. Barnes, an exhibit in the case of the West park board against the receiver, and I went so far as to trace out how the notes were discounted that made the payments.

Mr. BARNES: I think they were bond sales, but, of course, he didn't get it from the books. I am willing it should remain
440 in the record.

Judge MORAN: You didn't guess at it? You got the information from an authoritative source, and then traced it in the books from that starting point?

A. Yes, sir; but figures themselves don't give anything more than figures.

Said Defendant's Exhibits "M" & "N" so offered and admitted, as aforesaid, are in words and figures as follows:

441 *Deposits.*

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1894.			
April 13		$4,875.00	
		5,758.00	
		255,856.87	
	$249,024.75	1,500.00	$267,971.87
14		4,946.10	
	366.90	5,504.23	10,450.33
19		1,457.84	
		4,706.14	
	801.33	6,060.36	12,224.34
20		7,935.26	
		42,011.90	
	179.35	8,675.70	58,622.86
24		60.00	
		2,234.07	
		4,085.77	
	71.30	6,731.84	13,11–.68
25		4,000.82	
		1,060.62	
	96.94	4,169.09	9,230.53
30		12,254.13	
		4,489.79	
	164.15	3,981.00	20,724.92
May 2		18,180.31	
		4,558.94	
		9,522.38	
	308.01	7,058.66	39,320.29
5		36,215.00	
		7,421.41	
		426.00	
7	35,134.40	6,884.21	50,946.62
		4,956.19	
	220.80	6,063.91	
		3,810.20	
	335.17	19,080.86	33,911.16
14		12,048.80	
	533.30	7,497.84	19,546.64
15		10,360.39	
		5,229.90	
	100.00	7,186.38	22,776.67

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1894.			
May 17		$10,087.42	
		4,755.01	
		40,000.00	
	$566.71	20,776.16	$75,618.59
19		4,296.64	
		1,000.00	
	194.86	14,031.05	19,327.69
23		3,944.11	
		1,008.00	
	166.40	7,511.12	12,463.23
24		50,000.00	
		3,536.91	
		2,542.42	
	50,000.00	12,867.39	68,946.72
26		3,162.08	
	200.00	11,535.22	14,697.30
28		4,903.80	
		2,700.00	
	179.80	4,511.12	12,114.92
June 1		6,191.31	
		5,339.01	
	205.80	11,504.57	23,034.89
4	142.79	24,633.95	
	521.47	1,000.00	
	155.00	5,246.37	30,880.32
442			
June 5		8,078.22	
		12,136.95	
	125.00	12,791.84	33,007.01
6		19,720.77	
		3,000.95	
	478.72	6,269.75	28,991.47
8		10,000.00	
		2,076.30	
		5,594.31	
	35,000.00	44,997.41	62,668.02
9		3,500.00	
		4,521.26	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1894.			
June 9	$10,000.00	$10,334.76	$18,356.02
11		1,427.36	
		8,413.10	
	574.35	13,768.77	23,609.23
18		1,905.26	
	40,000.00	5,060.67	
	559.55	46,630.15	53,596.08
19		4,468.86	
		8,673.55	
	247.54	6,402.79	19,545.20
25	697.40	6,687.41	
	186.00	3,228.02	9,915.43
27		7,889.48	
	46.50	4,124.99	12,014.47
July 2		20,000.00	
		10,000.00	
	20,000.00	6,634.59	
		3,631.59	
	12,500.00	6,720.53	46,986.71
3	12,500.00		
	708.12	62,417.04	
	172.26	60,000.00	
	3,275.00	7,942.00	
	30,000.00	7,013.85	137,372.89
5		10,705.68	
		3,710.00	
	92.81	6,741.26	21,156.94
6		3,984.78	
		3,084.02	
	162.12	8,339.41	15,408.21
9	96.94	9,552.07	
	1,168.30	4,594.38	14,146.45
11		23,985.42	
		11,816.00	
	193.88	5,161.47	40,962.89
14		2,563.60	
		34,509.83	
	31,000.00	4,095.31	41,168.74
16		5,133.36	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1894.			
July 16	$718.75	$16,772.27	$21,905.63
19		5,024.67	
		9,717.85	
	5,024.67	4,690.22	19,432.74
20		4,486.35	
		2,528.04	
	218.87	3,151.50	10,165.89
23		4,325.05	
		2,599.50	
	661.20	7,999.22	14,923.77
26		17,116.97	
		1,109.70	
443			
July 26	465.81	2,460.86	20,687.53
30		12,087.85	
	564.05	2,529.51	14,617.36
Aug. 3		3,455.76	
		11,150.00	
		4,413.76	
	204.76	5,358.66	24,381.18
4		30,866.67	
		1,140.00	
	15,900.53	5,436.05	37,442.72
6		4,649.55	
		1,900.00	
	1,000.00	10,427.08	16,976.63
10		2,065.65	
	937.46	3,719,61	
	629.22	11,607.68	17,392.94
15		3,075.87	
	606.95	3,449.92	6,525.79
20		5,362.50	
		21,392.96	
	417.15	3,082.90	29,838.36
22		3,578.97	
	30,000.00	4,144.65	7,723.62
27		2,332.56	
		5,039.66	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1894.			
Aug. 27.....	$408.40	$8,641.32	$16,013.54
Sept. 1.....	.....	3,560.78	
.....	.....	6,989.51	
....	200.64	12,251.36	22,801.65
5.....	.....	7,379.01	
.....	.....	14,876.28	
.....	564.42	3,100.00	25,355.29
8.....	.....	31,945.30	
.....	.....	1,441.42	
.....	25,000.00	3,550.37	36,937.09
10.....	.....	11,401.18	
.....	.....	4,932.09	
.....	105.70	1,540.17	17,873.44
14.....	.....	3,021.11	
.....	.....	6,993.96	
.....	276.14	1,175.10	11,190.17
19.....	.....	12,532.66	
....	119.65	3,554.70	16,087.36
25.....	.....	2,777.30	
.....	.....	16,103.41	
.....	.....	.50	
.....	82.45	47,077.50	65,958.71
27.....	.....	3,649.21	
....	196.78	6,034.20	9,683.41
Oct. 1.....	.....	4,665.65	
.....	.....	7,876.74	
.....	172.40	16,684.52	29,226.91
5.....	25,000.00	25,000.00	
.....	.....	6,180.82	
.....	.....	18,286.84	
.....	.....	8,556.93	58,024.59
9.....	.....	14,048.86	
.....	.....	6,206.41	
.....	181.87	2,550.00	22,805.27
17.....	.....	1,028.79	
.....	25,000.00	3,840.06	
444			
Oct. 17.....	10,000.00	20,920.63	25,789.48

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1894.			
Oct. 18		$4,340.96	
		3,000.00	
	$478.27	18,408.78	$25,749.74
Nov. 1		12,651.81	
	151.49	27,122.64	
		8,596.24	
	25,000.00	4,303.27	52,673.96
5		8,830.03	
		5,600.00	
		9,010.58	
	15,000.00	15,000.00	38,440.61
12		6,600.86	
		3,135.15	
	654.81	13,132.92	22,868.93
16		10,656.47	
		1,979.00	
	50,000.00	5,487.38	18,122.85
19		13,977.95	
	556.19	3,978.25	17,956.20
23	55,890.72		
	5,429.45	11,068.51	
	51,645.03	3,725.81	14,974.32
28		9,209.17	
	84,135.78	20,031.00	
	126.20	4,606.04	33,846.21
30		37,147.12	
		2,906.57	
	30,000.00	7,000.00	47,053.69
Dec. 3		5,456.17	
		1,289.60	
	148.14	14,159.13	20,904.90
4		7,900.50	
		6,193.09	
	7,900.50	6,763.79	21,857.38
7		25,000.00	
	25,000.00	4,473.55	
	225.00	10,613.69	40,087.24
13		11,221.41	
	198.74	18,338.44	29,559.85

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1894.			
Dec. 31		$4,276.74	
		2,403.05	
		25,000.00	
	$25,000.00	14,908.93	$46,588.72
1895.			
Jan'y 3		47,267.80	
		9,552.86	
		25,000.00	
		17,400.18	
	25,000.00	14,940.82	114,161.66
8		5,184.33	
		12,576.36	
	138.47	9,883.47	27,644.16
14		5,236.73	
	166.07	13,081.79	
	100.00	24,475.00	
	25,000.00	25,000.00	67,793.52
17		4,199.45	
	100.34	18,351.43	22,550.88
445			
Jan'y 25		2,504.61	
	6,025.00	13,054.83	15,559.44
26		3,009.69	
	137.00	9,077.31	12,087.00
31		3,367.61	
	8,554.00	11,663.69	15,031.30
Feb'y 1		5,991.52	
	125.00	8,359.39	
	807.80	3,051.17	17,402.08
6		10,273.30	
	576.34	4,021.39	14,294.69
11		1,002.20	
		13,348.66	
	75.00	5,362.64	19,713.50
19		4,269.50	
	63.72	15,000.00	
	522.52	21,743.11	41,012.61
21		3,292.94	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1895.			
Feb'y 21	$212.50	$7,915.19	$11,208.13
26		5,056.61	
	125.00	1,041.82	
	711.39	13,422.10	19,520.53
27		21,849.29	
	788.80	2,870.61	24,719.90
March 1	315.15		
	604.92	3,188.94	
	125.00	23,225.70	
	146.45	8,002.54	
	1,086.32		34,417.18
6	3.00	4,871.90	
	201.64	22,462.38	27,334.28
8		26,542.49	
	100.82	7,609.49	34,151.98
12		6,640.39	
	357.45	56,987.47	63,627.86
18		10,000.00	
		2,758.05	
		4,031.57	
	202.61	9,646.43	26,436.05
27		10,391.77	
	101.31	2,749.86	13,141.63
April 1		18,599.51	
		3,550.00	
	298.30	3,591.75	25,741.26
3		13,935.06	
		119,174.57	
	30,000.00	814.69	
	85,674.57	11,975.74	145,900.06
17		4,640.79	
	412.89	11,087.96	15,728.75
18		10,000.00	
		9,627.36	
	195.50	4,733.72	24,361.08
20		4,064.63	
		6,673.64	
	412.89	3,000.00	13,738.27
23		50,000.00	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1895.			
April 23.....	$50,000.00	$5,017.54	
.....	.....	5,922.89	$60,940.43
446			
April 29.....	.....	12,279.56	
.....	135,000.00	135,000.00	
.....	.....	4,128.27	151,407.88
30.....	.....	5,162.13	
.....	.....	1,163.82	
....	29.00	6,055.28	12,381.23
May 2.....	.....	9,258.27	
.....	.....	11,405.00	
.....	356.00	3,719.73	24,383.00
3.....	515.10	13,244.76	
.....	151.75	5,455.09	18,699.85
4.....	.....	5,211.28	
.....	101.79	10,396.34	15,607.62
7.....	254.20	27,765.93	
.....	101.84	8,164.25	35,930.18
8.....	.....	19,467.00	
.....	.....	2,750.00	
.....	203.73	4,923.99	27,140.99
11.....	102.03	12,658.85	
....	40,000.00	4,328.13	16,986.98
13.....	....	10,492.22	
.....	....	5,207.13	
.....	.....	41,400.00	57,099.35
15.....	.....	16,829.97	
.....	313.55	2,673.90	
.....	2.50	2,232.71	21,799.58
21.....	.....	10,294.16	
.....	51.15	4,364.81	14,658.97
27.....	1,950.17		
.....	34,920.83	25,159.76	
.....	213.57	3,643.54	
.....	9,347.36	2,959.62	31,762.92
31.....	.....	5,645.45	
.....	194.55	3,994.83	9,640.28
June 3.....	.....	12,063.15	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1895.			
June 3	$1,050.09	$4,528.49	
	302.07	2,613.11	$19,204.75
4		18,808.00	
	125.00	7,500.00	
	823.70	6,525.67	32,833.67
7		10,983.18	
	125.00	5,291.60	16,274.78
14		6,737.89	
	641.55	4,847.74	11,585.63
20		7,292.27	
	410.63	2,198.00	
	605.70	5,574.65	15,064.92
22		12,223.99	
		40,000.00	
		2,120.77	
	40,000.00	4,034.45	58,379.21
25	410.94	16,098.89	
	681.20	3,891.43	19,990.32
28		27,199.88	
		6,240.31	
	125.00	3,880.70	37,320.89
July 2		22,242.37	
		3,020.75	
	924.81	5,456.98	30,720.10
3		12,155.49	
		1,000.00	
447			
July 3	264.90	6,654.25	19,809.74
5		40,000.00	
	615.20	13,834.27	
	622.32	5,624.91	59,459.18
8		11,378.85	
		3,175.00	
	711.90	4,859.71	19,413.56
10		23,565.69	
		1,630.00	
	125.00	4,829.32	30,025.01
15		20,810.91	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1895.			
July 15		$4,595.26	
		2,544.47	
	$540.45	4,840.81	$32,791.45
17		8,503.22	
		1,209.42	
	205.52	3,357.15	13,069.79
18	15,000.00	7,025.19	
	25,000.00	40,000.00	
	908.29 (X)	4,468.00	51,493.19
22		11,959.31	
	550.05	3,399.80	15,359.11
29		12,222.75	
	461.85	3,055.79	15,278.54
Aug. 3		9,840.92	
	209.25	5,262.16	15,103.08
6		20,208.13	
		20,000.00	
	549.80	5,237.56	45,445.69
8		48,508.44	
		4,566.87	
		3,803.96	
	45.00	6,419.55	63,298.52
9		49,485.35	
	40,000.00	3,164.90	
	136.65	4,223.53	56,873.78
12		25,130.32	
		1,578.45	
	635.70	4,765.44	31,474.21
13		15,198.93	
	6,000.00	5,938.21	21,137.14
19		32,209.15	
		600.00	
	506.45	3,521.70	36,330.85
26		6,949.73	
		3,736.30	
	415.45	2,711.12	13,397.15
Sept. 3	.24	5,801.71	
	217.50	18,976.23	
	333.55	3,784.95	28,562.89

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1895.			
Sept. 4	$20,000.00	$65,121.11	
	5,000.00	10,481.77	
	25,000.00	10,752.77	$86,355.65
6		5,449.70	
		5,025.70	
	85.00	6,892.42	17,367.82
12		10,991.63	
	266.40	4,534.43	15,526.06
17	120.05	31,785.60	
	25,900.00	5,092.74	36,878.34
448			
Sept. 19		33,691.08	
		3,967.40	
	45.03	3,340.38	40,998.86
23		12,396.45	
	149.00	2,950.83	15,347.28
Oct. 1		13,062.60	
		8,025.00	
	321.60	4,518.83	25,606.43
2		6,330.59	
	267.85	9,174.85	15,505.44
7		20,576.47	
		64.00	
		3,053.68	
	19.60	9,917.14	33,611.29
8		6,000.00	
		4,075.00	
		6,984.70	
	30,000.00	39,061.49	56,121.19
9	2,000.00	7,038.92	
	28.53	4,593.87	11,632.79
21		19,494.79	
	2,128.27	4,873.78	24,368.57
24	36.40	9,437.77	
	162.00	2,575.00	
	196.88	3,568.61	15,581.38
30		47,081.70	47,081.70
31	15,000.00		

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1895.			
Oct. 31	$10,000.00	$42,217.89	
	162.31	4,200.00	
	298.31	3,507.56	
	3.95		$49,925.45
Nov. 1		14,776.67	
		7,000.00	
	219.00	3,491.19	25,267.86
6	195.00	20,698.00	
	263.53	33,813.69	
	268.79	5 149.34	
	1,257.00		59,661.03
8		13,565.80	
	531.00	5,549.58	19,115.38
18	10,000.00	43,452.90	
	99.40	1,755.35	
	1,090.20	4,725.84	
	5,000.00		
	10,000.00		49,934.09
22		8,760.86	
	165.95	3,832.77	12,593.63
29	101.89	10,601.17	
	3,362.06	4,226.88	14,828.05
Dec. 2		12,307.96	
	183.45	4,200.28	16,508.24
4		13,122.95	
		11,005.95	
	83.33	6,915.02	31,043.92
5	9,736.08		
	8,425.75	57,475.32	
	1,272.23	5,497.24	62,972.56
14	3,346.28		
	7,574.76		
	15,002.36		
	10,418.10		
449			
Dec. 14	12,883.25	102,076.88	
	41,427.20	3,777.40	105,854.28
17		9,365.24	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois	
		Items.	Total.
1895.			
Dec. 17		$2,685.48	
	$150.00	5,370.83	$17,421.55
24	81.85	1,825.75	
		9,249.15	
		4,915.00	
		7,993.18	23,983.08
27		10,212.46	
		2,616.64	
	81.85	4,884.56	17,713.66
30		7,275.62	
	244.00	1,275.21	
	85.20	3,871.60	12,422.43
31	57,422.36	11,939.95	
	45,513.89	4,791.09	16,731.04
1896.			
Jan'y 2		16,095.12	
	203.70	5,238.78	21,333.90
4	83.33	10,315.91	
	466.66	9,033.03	19,348.94
7		22,277.98	
		1,940.00	
	100.41	7,292.79	31,510.77
13		25,363.95	
		4,047.11	
	81.84	4,499.34	33,910.40
20		8,899.98	
	153.44	5,600.00	
	592.40	3,933.34	18,433.32
23	86.10	12,456.83	
	100.67	3,490.46	15,947.29
29		1,860.00	
		11,585.27	
		6,013.00	
	184.78	2,834.10	22,292.37
Feb'y 1		7,844.13	
		1,780.00	
	169.59	3,465.89	13,090.02
3		9,075.94	
	291.03	1,467.16	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1896.			
Feb'y 3.....	$123.33	$4,641.90	$15,185.00
4.....	.....	21,151.38	
.....	.....	1,000.00	
.....	752.21	4,080.54	26,231.92
13.....	.....	9,426.12	
.....	.....	13,212.69	
.....	.....	3,353.61	
.....	299.58	4,907.32	30,899.74
19.....	.....	8,755.54	
.....	.....	93,678.75	
.....	426.15	3,639.83	
.....	507.48	1,479.72	107,553.84
25.....	.....	2,005.00	
.....	175.00	10,577.54	
.....	101.23	6,328.23	18,910.77
26.....	.....	11,999.35	
.....	151.63	6,553.73	18,553.08
450			
Feb'y 27.....	.....	12,425.14	
.....	2,295.57	2,100.00	
.....	278.16	2,222.15	16,747.29
28.....	.....	14,012.87	
.....	.....	4,710.44	
.....	759.48	3,004.38	21,727.69
29.....	.....	8,995.62	
.....	1,304.50	3,413.93	12,409.55
March 2.....	.....	500.00	
.....	.....	55,376.29	
.....	135.35	5,960.77	61,837.06
3.....	.....	5,300.80	
.....	.....	18,736.96	
.....	83.33	4,445.44	28,483.20
10.....	.....	3,015.71	
.....	.....	30,146.44	
.....	.....	4,570.18	
.....	129.48	5,388.84	43,121.17
17.....	.....	12,688.66	
.....	307.70	5,054.19	17,742.85

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1896.			
M'ch 23		$47,547.73	
		1,400.00	
	$40,000.00	3,637.73	$52,585.46
30	330.00	11,871.96	
	58.33	3,255.41	15,127.37
April 1	112.89	243,481.04	
	B 233,700.00	3,474.85	246,955.89
2		12,377.41	
		3,166.00	
	86.33	3,223.84	18,767.25
3		8,916.68	
		30,849.72	
	B 25,000.00	5,608.66	45,375.06
8		7,811.68	
		16,070.97	
		47,318.49	
	42,318.49	5,875.74	77,076.88
9		9,924.06	
	83.33	1,446.45	
	15,000.00	7,474.31	18,844.82
14	178.85	11,781.30	
		4,976.75	16,758.05
22		15,834.96	
		7,278.00	
	193.15	2,956.88	26,069.84
24		9,410.19	
		1,783.51	
	1,337.29	3,809.19	15,002.89
27		1,677.80	
		4,804.13	
	84.55	18,271.70	24,753.63
30		10,141.25	
	125.00	2,792.99	12,934.24
May 1		12,228.67	
	440.40	3,553.16	15,781.83
4		2,389.02	
		65,699.77	
	473.83	1,600.00	
	40,000.00	4,902.89	74,591.68
12	501.75	10,010.72	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
451			
1896.			
May 12	$273.50	$10,273.63	$20,284.35
13	91.13	25,414.63	
	83.33	4,284.42	29,699.05
18		3,075.05	
		7,831.61	
	285.95	4,559.95	15,466.61
23		8,636.15	
		5,051.65	
	125.00	3,100.00	
	201.08	2,548.12	19,335.92
25		49,000.00	
		8,911.35	
		3,663.65	
	417.75	3,406.36	64,981.36
June 1		13,663.97	
	315.73	4,221.97	17,885.94
2	40,000.00	57,283.99	
	406.74	5,815.83	63,099.82
8		16,461.49	
		2,850.00	
	250.33	5,215.38	24,526.87
15		17,971.91	
		3,000.00	
	464.45	4,309.82	25,281.73
19		14,518.12	
	94.35	2,865.19	17,383.31
22		1,188.23	
		9,070.09	
		1,200.00	
	393.00	3,433.04	14,891.36
29		11,333.72	
		3,000.00	
		4,040.76	
	B 354,160.00	354,160.00	372,534.48
30		13,215.83	
		1,904.10	
	420.15	5,511.00	20,630.93
July 1		10,854.40	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1896.			
July 1.....	$8,750.00	$8,500.00	
.....	369.00	3,610.27	$22,964.67
2.....	367.20	11,733.50	
.....	83.33	3,700.62	15,434.12
7.....	.....	3,000.00	
.....	108.10	8,647.25	
.....	484.65	6,545.00	18,192.25
9.....	.....	8,876.38	
.....	.....	3,150.00	
.....	83.33	5,059.28	17,085.66
13.....	.....	1,698.23	
.....	.....	11,466.95	
.....	516.60	3,891.87	17,057.05
14.....	.....	41,709.63	
.....	10,000.00	5,455.85	
.....	15,000.00	4,932.93	52,098.41
20.....	.....	10,459.68	
.....	178.25	3,014.39	13,474.07
27.....	.....	6,374.31	
.....	338.95	3,253.75	9,628.06
452			
Aug. 1.....	.....	5,724.93	
.....	602.40	2,874.17	8,599.10
3.....	.....	7,589.84	
.....	.....	3,125.00	
.....	444.38	3,149.87	13,864.71
5.....	.....	3,284.55	
.....	.....	5,513.87	
.....	125.00	36,400.00	
.....	30,000.00	3,789.40	48,987.82
10.....	.....	8,973.72	
.....	.....	2,521.20	
.....	410.13	4,989.85	16,214.77
12.....	.....	29,920.17	
.....	10,000.00	1,856.42	
.....	15,000.00	3,536.14	35,312.73
17.....	.....	6,438.44	
.....	287.45	4,514.33	10,952.77

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1896.			
Aug. 24		$2,216.55	
		5,754.70	
	$266.20	3,326.75	$11,298.00
27		4,937.70	
		50,000.00	
	50,000.00	3,506.49	58,444.19
31		924.09	
		9,948.35	
	1,417.01	46,560.94	
	28.10	4,100.00	
	273.00	3,151.98	64,687.36
Sept. 1		6,797.31	
		1,159.08	
	455.20	3,390.41	11,346.80
2		5,886.07	
		4,517.60	
		1,175.63	
	166.66	2,746.16	14,325.46
8		3,398.81	
	30,000.00	56,870.15	
	213.80	1,533.70	
	20,000.00	4,939.16	66,741.82
14		10,524.12	
		7,180.66	
		1,525.00	
	395.50	4,110.05	23,339.83
23		23,218.60	
	10,000.00	34,997.40	
	476.75	3,569.18	
	15,000.00		61,785.18
28		9,315.18	
		1,248.95	
	210.75	2,397.93	12,962.06
Oct. 1		14,268.62	
		3,884.40	
	492.00	4,184.05	22,337.07
2		25,000.00	
	10,000.00	7,704.32	
	15,000.00	2,429.16	35,133.48

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1896.			
Oct. 6.....	.....	$5,000.00	
.....	.....	7,497.40	
453			
Oct. 6.....	$239.63	5,123.16	$17,620.56
12.....	.....	5,164.64	
....	.....	2,025.00	
.....	59.55	5,392.02	12,581.66
14.....	17,500.00	45,056.96	
.....	20,000.00	5,968.38	51,025.34
24.....	24.20		
.....	1,326.34	10,411.18	
.....	82.46	4,207.27	14,618.45
31.....	10,000.00		
.....	10,000.00		
.....	5,000.00		
.....	10,000.00	1,137.30	
.....	15,000.00	5,731.95	
.....	457.50	2,601.16	9,470.41
Nov. 2.....	.....	14,534.80	
.....	.....	50,000.00	
.....	.....	2,627.09	67,161.89
4.....	.....	2,836.95	
.....	.....	11,105.99	
.....	208.33	4,606.04	18,548.98
6.....	.....	2,000.00	
.....	....	20,638.20	
.....	186.75	5,425.81	28,064.01
20.....	.....	68,135.79	
.....	60,000.00	3,461.26	71,597.05
24.....	95.00	9,288.88	
.....	28.15	4,306.90	13,595.78
Dec. 2.....	.....	23,941.60	
.....	.....	1,232.85	
.....	.....	24,554.00	
.....	406.29	5,202.60	54,931.05
7.....	.....	1,250.00	
.....	.....	12,297.78	
.....	.....	97,500.00	

Deposits—Continued.

Date.	West park board with E. S. Dreyer & Co.	E. S. Dreyer & Co. with Natnl. Bank of Illinois.	
		Items.	Total.
1896.			
Dec. 7.....	.....	$3,876.27	
.....	$88.14	5,860.06	$120,784.11
17.....	929.20		
.....	126.37		
.....	1,843.95	22,985.63	
.....	6,035.46	6,803.54	29,789.17

454

Date.	Receipts from sale of bonds West park board.	Checks and warrants of West park board on E. S. Dreyer & Co.	Balance West park board with E. S. Dreyer & Company.	Balance E. S. Dreyer & Company with Natnl. Bank of Ill.
1896.				
March 30.....	.....	.....	99,031.98	57,058.54
April 1.....	233,700.00	1,323.93	331,520.94	268,833.08
2.....	.....	34.82	331,572.45	225,801.13
3.....	25,000.00	8,119.51	348,452.94	224,978.91
4.....	.....	18,084.36	330,368.58	130,367.85
6.....	.....	700.00	329,668.58	99,543.07
8.....	.....	269.57	371,717.50	147,879.73
9.....	.....	15,001.80	371,799.03	135,626.16
11.....	.....	2,037.50	369,761.53	138,434.85
14.....	.....	.....	369,940.38	133,244.40
15.....	.....	2,466.00	367,474.38	131,615.08
16.....	.....	504.50	366,969.88	64,316.85
17.....	.....	570.00	366,399.88	65,210.04
18.....	.....	1,650.46	364,749.42	22,061.30
21.....	.....	51.30	364,891.27	36,493.20
22.....	.....	5,916.55	358,974.72	42,520.24
23.....	.....	15,444.51	343,530.21	— 23,376.51
24.....	.....	734.29	344,133.21	— 33,284.23
25.....	.....	2,931.98	341,801.23	— 42,672.38
27.....	.....	388.89	341,496.89	— 33,645.39
28.....	.....	259.30	341,237.59	— 32,359.80
29.....	.....	65.25	341,172.84	— 35,047.99

Date.	Receipts from sale of bonds West park board.	Checks and warrants of West park board on E. S. Dreyer & Co.	Balance West park board with E. S. Dreyer & Company.	Balance E. S. Dreyer & Company with Natnl. Bank of Ill.
1896.				
April 30		7,372.25	333,925.09	— 54,086.91
May 1		16.75	334,348.74	— 56,410.97
2		4.50	334,344.24	— 59,026.35
4		208.00	374,610.07	— 7,637.47
5		177.50	374,432.57	14,220.99
6		182.17	374,250.40	22,241.37
7 x		30,535.20	343,715.20	— 4,428.70
11		122.25	343,592.95	2,666.64
12		2,500.00	341,868.20	— 5,397.33
13		1,485.00	340,557.66	605.74
15		540.00	340,017.66	— 13,262.62
18 x		5,500.00	384,803.61	— 24,461.45
19 x		6,087.00	328,716.61	— 24,027.74
20 x		13,149.54	315,567.07	— 29,406.46
21 x		7,352.79	308,214.28	— 29,958.51
22 x		11,075.67	297,138.61	— 47,772.91
23		1,301.87	296,162.82	— 47,041.96
25		511.71	296,068.86	— 50,402.69
26 x		3,068.87	292,999.99	— 63,719.68
27 x		3,500.00	289,499.99	— 79,318.74
28		1,459.08	288,040.91	— 178,180.29
29		302.93	287,737.98	— 159,115.88
June 1		421.96	287,631.75	— 17,148.83
2		3,818.49	324,220.00	18,060.17
3		10.07	324,209.93	17,031.41
5		23,284.61	300,925.32	14,184.60
6		29.10	300,896.22	10,394.75
8		47.00	301,099.55	9,656.85
10		187.50	300,912.05	— 3,742.14
13		41.00	300,871.05	— 6,283.62
15			301,335.50	3,614.40
455				
June 16		33.00	301,302.50	14,350.78
17 x		22,594.92	278,707.58	— 22,505.07
18 x		18,578.33	260,129.25	— 35,706.49
19 x		10,736.07	249,487.53	— 47,965.06
20 x		12,557.17	236,930.36	— 72,902.24
22 x		1,419.27	235,904.09	— 67,292.09
23 x		2,811.41	233,092.68	— 66,379.46
24 x		5,079.11	228,013.57	— 80,589.05
25 x		6,248.05	221,765.52	— 84,384.00

Date.	Receipts from sale of bonds West park board.	Checks and warrants of West park board on E. S. Dreyer & Co.	Balance West park board with E. S. Dreyer & Company.	Balance E. S. Dreyer & Company with Natnl. Bank of Ill.
1896.				
June 26		599.85	221,165.67	— 117,167.22
27		178.10	220,987.57	— 118,907.08
29	354,160.00	42.79	575,104.87	232,916.83
30		10,000.00	565,525.02	233,854.02
July 1		45,521.17	529,122.85	79,609.35
2		4,572.50	525,000.88	36,903.43
3		24,927.81	500,073.07	26,375.90
6		5,275.00	494,798.07	19,315.21
7		1,040.00	494,350.82	11,353.45
8		5,505.74	488,845.08	8,953.92
9		8,121.98	480,806.43	1,191.99
10		512.50	480,293.93	2,304.76
11		25.00	480,268.93	8,051.94
13		3,366.25	477,419.28	5,362.09
14		4,130.43	498,288.85	32,671.39
18		1,875.00	496,413.85	25,596.03
20		1,170.00	495,422.10	13,032.51
21		9,678.75	485,743.35	10,651.29
22 x		10,988.23	474,755.12	— 2,253.50
23 x		16,825.54	457,929.58	— 25,738.62
24 x		5,792.28	452,137.30	— 38,771.74
25 x		2,426.77	449,711.53	— 4,536.76
27 x		2,081.64	447,968.84	— 9,695.07
28		27.00	447,941.84	— 7,706.13
29		60.00	447,881.84	— 11,069.40
30		212.11	447,669.73	— 5,165.86
31		88.89	447,580.84	— 1,853.99
Aug. 1 x		4,527.93	443,655.31	— 25,594.29
3 x		2,969.12	441,130.57	— 38,648.80
4 x		512.50	440,618.07	— 38,266.07
5 x		25,039.11	445,708.96	— 2,276.92
6 x		6.35	445,697.61	— 7,092.32
7 x		787.00	444,910.61	— 15,786.18
8 x		1,043.73	443,366.38	— 7,641.46
10 x		36.88	444,240.13	— 7,662.13
12		550.00	468,690.13	15,040.87
13		6,400.50	462,289.63	5,431.76
14 x		12,133.56	450,156.07	— 11,709.18
15 x		10,271.26	439,884.81	— 22,501.34
17 x		12,803.57	427,363.69	— 48,189.39
18 x		7,981.86	419,381.83	— 58,639.22
19		2,473.01	416,908.82	— 64,617.69

Date.	Receipts from sale of bonds West park board.	Checks and warrants of West park board on E. S. Dreyer & Co.	Balance West park board with E. S. Dreyer & Company.	Balance E. S. Dreyer & Company with Natnl. Bank of Ill.
1896.				
Aug. 20		5,866.47	411,042.35	— 7,953.39
21		134.05	410,908.30	— 6,900.20
22		41.30	410,867.00	— 8,739.35
24 x		1,921.46	409,211.74	— 9,520.43
25 x		4,524.00	404,687.74	— 23,899.77
26		2.50	404,685.24	— 23,147.79
27		4.65	454,680.59	27,648.65
456				
Aug. 28		5,152.00	449,528.59	10,009.22
29		70.55	449,458.04	— 2,380.25
31		20.26	451,155.89	48,150.26
Sept. 1		240.00	451,371.09	40,906.71
2		1,131.97	450,405.78	39,175.38
3		90.00	450,315.78	36,500.37
4		24,881.98	425,433.80	32,685.31
5		122.25	425,311.55	29,236.14
8			475,525.35	69,487.61
10		139.68	475,385.67	15,153.34
11		1,622.66	478,763.01	— 2,549.94
12 x		4,425.32	469,337.68	5,984.13
14			469,733.18	9,390.00
16		3,676.70	466,056.48	2,962.98
17		13,241.08	452,815.40	— 8,933.20
18		13,798.09	439,017.31	11,793.49
19		8,698.97	430,318.34	5,031.96
21		4,414.02	425,904.32	607.84
22		1,197.35	424,706.97	— 7,085.37
23		208.91	449,974.81	47,897.27
24		5,290.15	444,684.66	43,257.46
25		3,078.21	441,606.45	32,537.28
26		1,702.31	439,904.14	19,147.54
28		3,253.90	436,860.99	13,025.29
29		5,780.13	431,080.86	14,180.61
30		1,063.50	430,017.36	10,950.78
Oct. 1 x		3,923.62	426,585.74	— 1,590.12
2		2,397.15	449,188.59	7,877.87
3		125.00	449,063.59	11,853.54
5		25,227.27	423,836.32	11,403.00
6			424,075.95	3,626.44
7		1,052.90	423,023.05	29,746.27
10		85.00	422,938.05	— 1,487.24

Date.		Receipts from sale of bonds West park board.	Checks and warrants of West park board on E. S. Dreyer & Co.	Balance West park board with E. S. Dreyer & Company.	Balance E. S. Dreyer & Company with Natnl. Bank of Ill.
	1896.				
Oct.	12 x		1,027.50	421,970.10	— 9,787.56
	13 x		1,147.25	420,822.85	— 11,416.62
	14			458,322.85	22,009.41
	16		1,173.42	457,149.43	8,687.36
	19		239.44	456,909.99	855.21
	20 x		390.00	456,519.99	— 1,849.18
	21 x		11,290.63	445,229.36	— 8,223.96
	22 x		26,921.37	418,307.99	— 23,886.94
	23 x		19,051.42	399,256.57	— 58,717.28
	24 x		1,890.72	398,798.85	— 61,754.77
	26 x		978.44	397,820.41	— 62,185.08
	27 x		150.90	397,669.51	— 53,059.04
	28 x		735.00	396,934.51	— 49,138.99
	29 x		180.97	396,753.54	— 45,359.76
	30 x		6,205.00	390,548.54	— 51,118.01
	31 x		722.26	440,283.78	— 61,015.87
Nov.	2 x		35,011.69	405,272.09	— 31,352.65
	4 x		730.00	404,750.42	— 50,848.91
	5 x		48.00	404,702.42	— 63,636.69
	6 x		1,000.00	403,889.17	— 55,144.37
	7 x		46.88	403,882.29	— 53,835.61
	9 x		3,973.30	399,868.99	— 62,097.24
	10 x		598.52	399,270.47	— 66,382.97
	11 x		1,657.64	397,612.83	— 55,299.65
	13 x		1,749.00	395,863.83	— 57,648.52
	14 x		7,500.00	388,363.83	— 66,927.13
	16 x		21,145.79	367,218.04	— 83,720.90
457					
Nov.	17 x		3,791.30	363,426.74	— 83,785.79
	18 x		5,034.25	358,392.49	— 86,993.68
	19 x		3,348.19	355,044.30	— 87,803.70
	20 x		11,050.63	403,993.67	— 45,159.93
	21 x		12,811.60	391,182.07	— 56,643.53
	23 x		1,188.78	389,993.29	— 65,342.67
	24 x		3,494.19	386,622.25	— 63,323.99
	26 x		3,525.81	383,096.44	— 65,663.85
	27 x		52.66	383,043.78	— 70,945.14
	28 x		12,073.76	370,970.02	— 80,535.01
	30 x		2,797.04	368,172.98	— 81,693.49
Dec.	1 x		3,164.10	365,008.88	— 98,090.92
	2 x		3,986.78	361,428.39	— 82,965.98

Date.	Receipts from sale of bonds West park board.	Checks and warrants of West park board on E. S. Dreyer & Co.	Balance West park board with E. S. Dreyer & Company.	Balance E. S. Dreyer & Company with Natnl. Bank of Ill.
1896.				
Dec. 3.....	.....	111.50	361,316.89	— 87,268.40
5 x.....	.....	24,108.45	337,208.44	— 76,719.76
7.....	.....	5.55	337,291.03	16,147.05
8.....	.....	2,738.33	334,552.70	10,582.40
10.....	.....	32.10	334,520.60	5,384.89
15.....	.....	733.10	333,787.50	2,107.45
16.....	.....	9,878.97	323,908.53	1,975.94
17.....	.....	12,595.37	320,248.14	9,019.76
18.....	.....	3,975.82	316,272.32	4,032.08
19.....	.....	258.92	316,013.40	881.51

"x."—Items so marked are where an overdraft in the National Bank of Illinois by E. S. Dreyer & Company is continued or increased by drawing on that account by E. S. Dreyer & Company to protect West Park Board payments.

458 SATURDAY, *February 24th*, 1900—10 a. m.

Court met pursuant to adjournment.

Whereupon ANDREW J. GRAHAM, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. What is your name in full?
A. Andrew J. Graham.
Q. What is your business?
A. Banker.
Q. Are you now one of the West park commissioners?
A. Yes, sir.
Q. How long have you been a commissioner of the West park board?
A. About 7 years.
Q. Were you commissioner in 1894?
A. Yes, sir.
Q. Commissioner during the time that Dreyer was treasurer?
A. Yes, sir.
Q. You are a banker, you say?
A. Yes, sir.
Q. Were you then a banker?
A. Yes, sir.
Q. Do you know what the reputation of the National Bank of Illinois was at that time?

Which question was objected to by counsel for the People.

Judge MORAN: As to solvency?

The COURT: I think he may answer the question.

459 A. First class; never heard a question about it.

Judge MORAN:

(Q.) Did you know during the time that Dreyer was treasurer that Dreyer & Co.'s account was kept in the National Bank of Illinois?

Which question was objected to by the People as immaterial.

The COURT: I don't think that is material.

Judge MORAN: He is a member of the West park commissioners, your honor.

The COURT: I understand, but I don't see how his knowledge on the matter has anything to do with this case.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

CHARLES J. VOPICKA, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full.
A. Charles J. Vopicka.
Q. What is your business?
A. President of the Atlas Brewing Company.
Q. Were you ever a West park commissioner?
A. Yes, sir; from 1894 to 1897.
460 Q. From 1894 to 1897?
A. Yes, sir.
Q. That was while Dreyer was treasurer of the board?
A. Yes, sir.
Q. Were you acquainted at that time with the reputation for solvency and stability of the National Bank of Illinois?
A. Yes, sir.
Q. Were you a depositor in it?
A. Yes, sir; I had two accounts in the bank.

Which question was objected to by counsel for the People as immaterial.

Q. What was the reputation of that bank for solvency and stability?
A. Very good.
Q. During that time?
A. Yes, sir.
Q. Very good?
A. Yes, sir.

BENJAMIN S. MAYER, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full, please.
A. Benjamin S. Mayer.
Q. What is your business?
A. Assistant cashier Continental national bank.
Q. How long have you been with that bank?
A. I have been with that bank, virtually, since it has been
461 organized. I have been assistant cashier since January, 1898.
Q. Prior to that time you were in the bank?
A. I was in the bank, in the discount department.
Q. And in the banking business?
A. Yes, sir.
Q. Did you know the National Bank of Illinois?
A. Yes, sir.
Q. Did you know its reputation for solvency and stability up to the 19th day of December?
A. I did.
Q. Up to and including the 19th day of December, 1896?
A. I did.
Q. What was that reputation?
A. The reputation of the bank was good.
Q. As a solvent and stable bank?
A. As a solvent bank.

(Cross-examination waived.)

Mr. BARNES: We don't question that if you purpose to offer any other witnesses on the same ground.

462 JOHN A. KING, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full, Mr. King.
A. John A. King.
Q. What is your business?
A. Banker.
Q. What bank?
A. Fort Dearborn national bank.
Q. What officer are you of it?
A. President.
Q. President of the Fort Dearborn national bank?
A. Yes, sir.
Q. That bank has been in business how long; 10 or 12 years?
A. Thirteen the first day of May.
Q. Did you know the National Bank of Illinois?
A. I did.

Q. Did you know the reputation of that bank for solvency and stability up to the 19th or, say, 21st day of December, 1896?
A. Yes, sir.
Q. What was that reputation?
A. Of the very best.

(Cross-examination waived.)
Mr. BARNES: If there are any more witnesses to be called on this matter, I say the State doesn't question that. What is the use of wasting time on that?

463 HARLOW N. HIGINBOTHAM, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full.
A. Harlow N. Higinbotham.
Q. What business are you in?
A. Member of the firm of Marshall, Field & Company.
Q. You were here many years in business prior to 1896, Mr. Higinbotham?
A. Yes, sir.
Q. Did you know the National Bank of Illinois at that time up to December 19th or 20th, 1896?
A. In a general way; yes, sir.
Q. Did you know the reputation of that bank for solvency and stability up to that date?
A. It was considered very good.

(Cross-examination waived.)

Judge MORAN: Mr. Suddard is president of the West park board.
The COURT: On some other matter?
Judge MORAN: No, sir; this matter.
The COURT: I think you have called enough.
Judge MORAN: This is the last witness we will call on it, your honor.

464 JOSEPH W. SUDDARD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full.
A. Joseph W. Suddard.
Q. What is your business?
A. Manufacturing.
Q. Do you hold any official position?
A. I have been in the banking business up until the last month.
Q. I mean do you hold any office?
A. Political?
Q. Yes.

A. I am president of the West park board.
Q. How long have you been president?
A. Three years.
Q. Were you in the city and in business in the city, Mr. Suddard, for some years prior to December 19th or 20th, 1896?
A. Yes, sir.
Q. Do you know the National Bank of Illinois?
A. Yes, sir.
Q. Did you know the reputation of that bank for solvency and stability up to the 19th day of December, 1896?
A. I don't recollect the date of the failure.
Q. That was the date of the failure?
A. Yes, sir.
Q. What was that reputation?
A. It had always been good.
Q. Always good. Were you a member of the South park
465 board or West park board while Dreyer was treasurer?
A. No, sir.

(Cross-examination waived.)

JAMES W. HEDENBERG, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Will you give your name in full, please.
A. James W. Hedenberg.
Q. What is your business?
A. Real estate.
Q. How long have you lived in the city?
A. Since 1861.
Q. Do you know E. S. Dreyer?
A. Yes, sir.
Q. How long have you known him?
A. About 18 or 20 years.
Q. Do you know his character for honesty?
A. I believe so.
Q. And integrity?
A. Yes, sir.
Q. What is it; good or bad?
A. Good.

Mr. BARNES: I object and move—didn't get time to object. That is not a proper question. A man's character and a man's reputation are two very different things.
Judge MORAN: You mean to admit his character is good
466 and reputation bad.
Mr. BARNES: No; I don't admit either are good.
Judge MORAN: You are very fond of admitting some things.
Mr. BARNES: There are some things we can't admit and be just to the State and the truth. I am not admitting anything I don't

know is the truth and don't think is the truth. I move to strike out that question and answer.

The COURT: I don't think that is admissible.

Judge MORAN: The supreme court has decided that it is. Character is reputation.

The COURT: I don't think so. Character is what a man really is, and if we are going into the character we should have to go into an investigation of Mr. Dreyer's conduct as to a great many matters besides this.

Judge MORAN: This is his general character. It is the same as reputation.

The COURT: I don't think the words have the same significance.

Judge MORAN: I examined the question last night, your honor.

The COURT: What I understand the books to say about it is this: You are to judge of his general character from his general reputation, but that is not the question that is put to the witness.

Judge MORAN: It is just the question—means a man's gen-
467 eral character. His general character and his general reputation is the same thing, and so are the authorities. Your position is totally without regard to any authority. I examined last night, at my office, Rice on Evidence and this little California book on evidence. Here is the statement of the Illinois Reports, 34th. Here is the supreme court opinion: "The modern decisions in criminal cases go to the extent that in all criminal cases, whether the case is doubtful or not, evidence of good character is admissible on the part of the prisoner."

The COURT: Undoubtedly; but how is it to be arrived at?

Judge MORAN: By asking the question, Do you know his general character for honesty and integrity? that being the question here. Here is a statement in this little Moore book: "In all criminal cases, whether the case is doubtful or not, the accused may give in evidence his general or uniform good character as a man and as a citizen."

The COURT: Undoubtedly; I have no doubt about that.

Judge MORAN: The reason of this is that a man of good character is less liable to commit a crime. This is a fact and circumstance that should be taken into consideration by the jury in determining the guilt or innocence of the accused.

Mr. BARNES: Have you got any authority, Judge Moran, that shows anything other to be the proper question than what is his general reputation in the neighborhood in which he lives?

Judge MORAN: The question is, What is his character?

Mr. BARNES: Isn't that the proper question?

468 Judge MORAN: There is no dispute between us. Character is made up of reputation. If your honor has any doubt about that——

The COURT: You mean, Judge Moran, to say that we may go in in this investigation—the defense may come and show particular instances?

Judge MORAN: No, sir; nor I can't, either. It is his general character. The defense cannot go into particular instances at all.

I am not asking him if he knew that he was honest in a particular transaction.

The COURT: And the prosecution cannot?

Judge MORAN: No, sir.

The COURT: So that you mean to be understood that the word "character" in this question is synonymous with "reputation"?

Judge MORAN: Synonymous with "general reputation."

The COURT: In reality, what you are asking is no different than if you were asking "reputation," only you use the word "character" as synonymous with it?

Judge MORAN: Character is made up of general reputation.

The COURT: If you mean to use the word as synonymous with "general reputation," I see no objection to it.

Judge MORAN: Well, he has answered it.

469 Cross-examination by Mr. BARNES:

Q. Mr. Hedenberg, when you spoke—when you gave your answer do you mean to say that his general reputation in the community for honesty and fair dealing in his business matters has been good all the time up to January 31st, 1899?

Judge MORAN: That won't do, your honor. Now, the reputation can never be injured by the accusation that is made nor by the facts or circumstances that give rise to the accusation. It is wholly immaterial. I can destroy the character of anybody by an indictment or by a public accusation against them. The authorities laid down that beyond the time of the circumstances you cannot enquire. You can — that Mr. Dreyer is anything since this accusation is made. Let me take an instance: Suppose we are inquiring into the reputation of a woman for chastity, and it appears that she is indicted for adultery and remains under indictment, or that there are two or three indictments following each other, and then comes the trial of one of them. Can you destroy that character for chastity by saying what different people say about it since this accusation was made?

The COURT: Well, Judge Moran, if that contention is true, then the questions that you have asked are all improper. You cannot extend your question, as you did generally, and then limit
470 the People to a period anterior, as I take it, to the failure of Dreyer's bank.

Judge MORAN: I don't know, your honor.

The COURT: Your question cannot be proper, unless it is a proper question for the People. Your questions have all, in effect, come right down to the present day.

Judge MORAN: If your honor rules that way, I will not limit it. Let them go into it.

Mr. BARNES: I wish the court to understand our position here. I agree with counsel that it is not proper to ask what is the character of a man or his reputation after the date of his accusation. The date of the accusation here is February, 1899. We don't even ask it down to that date. The crime with which the defendant is

charged could not be a crime, under the statute, until a legal demand was made. That legal demand, as we contend, was made January 31st, 1899. If the demand is an ingredient of the crime, as it is under the statute, and has to be made, there could be no crime before January 31, 1899. There could be no legal accusation for a crime prior to that time. The accusation in this case is made in February, 1899. The crime is alleged to have taken place January 31st, 1899, or the failure to turn over funds after that date. Now, we contend that we have a right to ask what is the reputation of Mr. Dreyer. If they go into that question, we have a right to know that reputation down to the very day we claim that
471 accusation was made.

Judge MORAN: One word. I want to put this right. Counsel for the People, representing the State of Illinois here, says that he wants to make out before this jury—prove before this jury—anything prior to 1899, when this indictment was found. Counsel for the State is taking that position, your honor. Counsel for the State knows that he prosecuted an indictment against this man that was found in 1896——

Mr. BARNES: Not on this demand.

Judge MORAN: For this very case and under these very facts. He knows that, and in the face of this jury he gets up and says that.

Mr. BARNES: What I said was in the presence of the jury, and I stand by it.

Judge MORAN: You say it because you don't want to be fair. You know that this man was indicted, tried, rescued by the supreme court, on this very accusation, found in 1896. Talk that to this jury.

Mr. BARNES: Yes; I will. I say the accusation made upon this man was based upon another demand, which was technically declared to be bad by the supreme court, and not for that reason. A new indictment became necessary, because there was to be another demand, and that demand was made January 31st, 1899,
472 and not until that date could there be a legal accusation against him, and that accusation was made in this indictment February, 1899, and therefore he has committed no crime under the laws until the date of January 31st, 1899, and a trial of any other accusation prior to that time is not a trial of this accusation, and therefore I say I am fair, sir.

Judge MORAN: And therefore I say you are not fair, because you know that this accusation that he lost this money has been brought before this community under the other indictment, and no man who means to be fair can stand up and say that does not affect a man's character.

The COURT: The question here is as to this: The court said, and adheres to it, that if your questions covered down to the present time, then the People must be entitled to cover the entire time.

Judge MORAN: I will not limit it, your honor. Let him cross-examine.

Mr. BARNES: Very well. Read the question.

(The question was read, as follows:

"Q. Mr. Hedenberg, when you spoke—when you gave your answer do you mean to say that his general reputation in the community for honesty and fair dealing in his business matters has been good all the time up to January 31st, 1899?")

473 A. I mean when I say that——

Q. Answer yes or no.

A. To those people who know him.

Q. Answer yes or no. The question calls for an answer yes or no.

The COURT: You can answer the question yes or no, and if, having so done, you desire to explain your answer, you can.

A. Yes, sir.

Mr. BARNES: His reputation was good, general reputation?

A. Among those people who knew him; yes, sir.

Q. I didn't ask you to limit it in that way.

Judge MORAN: That's a proper limitation.

A. That's all I can say. I don't know what everybody says.

Mr. BARNES: It is the reputation he had in the community, whether it was known or not.

A. As far as my knowledge goes, his reputation was good in the community.

Q. Did you ever hear of his reputation not being good in the community in that period?

A. Not that I remember.

Q. Did you ever read the newspapers of the community with respect to his reputation?

Objected to by counsel for the defendant.

Q. During that period?

Judge MORAN: You cannot show what the newspapers said; that is not a proper enquiry. It is what people who knew about him, who knew him, said about him. What good is the opinion of a man who don't know anything about a man?

474 The COURT: I think the reputation of a man is made up by what people say about him.

Judge MORAN: But is it made up by what the newspapers say about him?

The COURT: Yes, sir; to some extent; not entirely, by any means.

Judge MORAN: I take an exception to that ruling.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

The COURT: Not entirely.

Judge MORAN: We don't know the reputation of thousands of men at all except as we read it in the newspapers. Is it any answer to a man's good character to show what the newspapers publish against him?

The COURT: No; not as to his good character, but the enquiry is as to what people generally say about him.

Judge MORAN: Not what newspapers say.

The COURT: Newspapers as much as anybody else, no more.

Judge MORAN: A newspaper is not a body at all. It is not a person. It is generally arrived, published by irresponsible persons who don't put their name to it.

The COURT: It has the written authorization of somebody, generally of the man who is the managing editor.

Judge MORAN: That is very impersonal.

The COURT: It is generally known who is the managing editor.

Judge MORAN: You don't know who the managing editors
475 are. I don't believe any of us do. I will save an exception to the remarks of the court.

Mr. BARNES:

(Q.) I will ask you this question, Mr. Hedenberg: When you speak of general reputation do you speak merely of what you had heard in the community generally about Mr. Dreyer or do you mean those who were his particular personal friends?

A. Only as I heard generally, including his personal friends.

Q. Including? Did you ever hear his reputation for honesty and integrity called in question during that period?

A. I don't remember any special instance.

Q. Never heard about it? Do you remember the failure of his bank?

A. Yes, sir.

Q. Do you remember the different matters which followed after that?

A. I don't know what you have reference to.

Judge MORAN: How? A little louder.

Mr. BARNES: What is that?

A. I say I don't know what you have reference to.

Q. The matters affecting Mr. Dreyer.

A. I remember there was some talk about the failure of the bank in the newspapers at the time. I had no personal talk with anybody.

Q. Did you ever hear in connection with that, Mr. Hedenberg, what was his reputation in regard to his honesty and integrity in his dealings as a banker in this community with the depositors?

Judge MORAN: Not as a banker in this community, as a
476 man. He is on trial here not as a banker.

The COURT: That constitutes a part of his reputation and character—his reputation as a banker—just as much as anything else.

Judge MORAN: Do you mean his reputation for honesty and integrity?

The COURT: Yes, sir; honesty and integrity as a banker.

Judge MORAN: It is his honesty and integrity, not the question of his financial standing.

The COURT: No, sir; not the financial standing.

Mr. BARNES: His reputation as a banker and business man—his reputation as to his honesty and integrity in regard to his dealings

as a banker and business man in this community—with regard to his depositors and his clients—those he had business with?

A. As far as my knowledge goes, it was good.

Q. I am not asking you for your knowledge or opinion. I say reputation; what was said about him, not what was said about it; but was that reputation questioned? Did you ever hear it questioned?

A. I never heard it questioned except in newspapers.

Q. Did you ever talk with anybody about it?

A. Not that I remember.

Q. Did you ever hear anybody talk about him?

A. Oh, incidentally sometimes, but I cannot now give you any specified instance.

477 Q. Did you hear people talk about him at all; about his affairs?

A. Occasionally.

Q. What is your business?

A. Real estate.

Q. Did you used to do business with Mr. Dreyer?

A. No, sir.

Q. Where is your office?

A. La Salle and Madison.

Q. Are you a relative of anybody in this room?

A. Not to my knowledge. I don't know of anybody here related to me.

Q. Personally acquainted with anybody in the trial outside of Mr. Dreyer?

Judge MORAN: I object. What is the purpose of such a question?

The COURT: I don't see any objection to that. It may be entirely immaterial whether he is or not.

Judge MORAN: Well, I object on the ground that it is immaterial.

The COURT: The objection is overruled.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. You mean anybody in the room?

Mr. BARNES: No; anybody connected with the trial.

A. Well, I know Judge Waterman. I have known Judge Waterman for a good many years. I know Judge Moran and Mr. Austrian and Mr. Berger. I believe that's all connected with the trial.

478 Redirect examination by Judge MORAN:

Q. You don't know Mr. Barnes?

A. I don't recollect of ever having met Mr. Barnes before.

Q. Well, you are unfortunate.

BENJAMIN C. BACHRACH, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full.
A. Benjamin C. Bachrach.
Q. What is your profession, Mr. Bachrach?
A. Lawyer.
Q. Were you ever one of the counsel under this indictment for E. S. Dreyer?
A. I assisted in the last trial.
Q. In the last trial; when did it occur?

Mr. BARNES: To that I object. It will be a matter of record.
Judge MORAN: Well, the date of it.
Mr. BARNES: I will withdraw the objection.

Judge MORAN: When was the date of it?
A. I don't remember the exact date, but it was some time in hot weather.
Q. Last summer?
A. Last summer.

Mr. BARNES: It was in August and September.
479 Judge MORAN: August 29th.
Mr. AUSTRIAN: It started August 29th.
Mr. BARNES: Oh, it started August 29th.

Judge MORAN: Was there a jury impaneled in the case?
A. Yes, sir.

Mr. BARNES: I object. If there was a jury impaneled we all know——

The COURT: Those are things that are matters of record which are very easy to show.

Judge MORAN: Yes, your honor, but you have set me to this point to support my allegation of fact. How can I prove my allegation of fact? I must prove it by any witness that knows.

Mr. BARNES: By the record.

Judge MORAN: No, sir; we are not confined to any record. The record will show it, I admit, but what occurred we can prove by anybody that was in court.

Mr. BARNES: That is extraordinary.

Judge MORAN: Well, wait and see whether I can. I can prove—and your honor is familiar with that rule—you can prove by any witness what occurred during a trial. You can prove by any witness what issue was submitted to the jury. You can prove whether an issue was submitted that was not set out in the pleading to the jury. Your honor is familiar with all that line of authorities. You can always show what was done by a witness in open court.
480 I am willing to prove this by Mr. Barnes. I can put him on the stand. There is no dispute about it.

The COURT: There are certain things that may be shown outside

of the record, although contained in the record. I think it will be expeditious to let him ask such a question as that.

(The pending question and answer were read as follows: "Q. Was there a jury impaneled in the case? A. Yes, sir.")

Mr. BARNES: I move to strike out that answer because the impaneling of a jury—it depends altogether for what purpose it was introduced. For instance, in these cases where we endeavor to show the record of a man, whether he has had a prior conviction, we can never show a trial or an impaneling of a jury otherwise than by the orders of court impaneling the jury.

Judge MORAN: I propose to put the record and all the orders in. I merely want to show what occurred here in court that is not shown by any record. I want to lead up to it.

The COURT: You may show the impaneling of the jury, but you will be compelled to resort to a record, because the mere impaneling of a jury does not show for what purpose the jury was impaneled.

Judge MORAN: I will put in the record and show exactly the names of the jurors who were impaneled. I have got it
481 right here ready.

The COURT: His answer may stand.

Judge MORAN:

(Q.) Were you here at the time that the jury in that case went out to consider the case?

A. I was.

Q. Do you remember the date when the case was given to the jury after the arguments were through, and the court's instructions, if there were any, were given to the jury?

A. No; I don't remember the exact date.

Q. Do you remember the hour of the day?

A. I only know that it was late in the afternoon, but the hour I cannot tell.

Q. Can you fix the hour—late in the afternoon? Can you state about the hour, as near as you can fix it, in the afternoon?

A. About 5 o'clock.

Q. About 5 o'clock? Were you in court when the jury was discharged?

A. I was.

Q. Do you remember when that was?

A. It was a little after 10 o'clock, I think, on the following morning.

Q. Wasn't it before 10 o'clock?

A. It may be. I am not sure what time court convened, whether half past nine, or ten.

Q. Half past nine, or ten?

A. Yes, sir; one of those two hours; a little after either half past 9 or a little after 10; I am not sure which.

Q. What took place here in court when the jury were discharged?

482 Mr. BARNES: That I object to. What difference does it make what took place? I suppose counsel is trying to call for court proceedings.

Judge MORAN: My question indicates what I want.

Mr. BARNES: I object to it. It is manifest what these questions lead up to. The purpose as announced by counsel in his opening statement is, it is his contention that because there was a discharge of this jury that this defendant has been once in jeopardy. Now, that question of law would arise, it seems to me, upon an offer to present the record in that case showing the order of the court discharging the jury. It could not possibly arise by the matters which should be inserted in the bill of exceptions. The record of the court or the action of the court cannot possibly be impeached by something that was said and not made a part of the record by bill of exceptions. Therefore, if counsel proposes to raise the question, it seems to me—and we are ready to meet it—it seems to me the proper way would be to offer the record in that case for the purpose of showing that the defendant has been once in jeopardy. Let the court then inspect the record, inspect the order, and then it seems to me it will raise the question. We have come to this question—if I am not right, if that is not the point we are coming to, correct me—whether anything outside of what is disclosed by the record can be considered by the court. Is that your proposition?

483 Judge MORAN: Certainly, the whole facts that occurred there.

Mr. BARNES: Now, the question is asked the witness here, what took place after the discharge of the jury?

Judge MORAN: No, sir; not at all—what took place when the jury was discharged—what was said here right in court by everybody.

Mr. BARNES: Now, all right. What was said, as counsel well knows—what was said must be something that was said for the court to act upon. The court's action must be determined from what appears in the record, not from what appears outside of it. If there was to be a review, if it was reviewable, the action of the court in discharging the jury, it should be reviewed only upon the record, the bond, and bill of exceptions, which will become part of the record. In this case there is a record. The whole question here must be confined to what is shown by the record. It would be most extraordinary, something that I never heard of. I don't think counsel can produce any authorities upon the proposition that outside parties or parties in the court-room can come in and say what the judge said or what anybody else said in regard to the judicial proceedings for the purpose of affecting the action of the court, which is manifested and evidenced by the record and that alone. It would be most extraordinary. Why, if that was the rule, we could go in and we would have a fight right here now as to what a number of

484 the auditors of the court-room would say. One would say the judge never said any such thing or the attorneys never said any such thing or the jurors never said any such thing. How are we going to determine those things? They are judicial proceedings,

and all judicial proceedings are evidenced by the record. It is only through the record that we know them. The court itself hasn't any memory of anything as to any judicial proceeding after the term was passed. It cannot correct its own record, except by a memorandum or a minute that was made at the time. The court has no memory. If the court has no memory, certainly none of the auditors in the room have any memory.

Judge MORAN: The gentleman is in his usual confusion on law questions. Suppose it appears that the court asks the jury whether they can agree or not, and the jury say they cannot agree. Can't I show that fact?

(The reporter couldn't hear Judge Moran's next sentence.)

Mr. BARNES: Wasn't it in the bill of exceptions?

Judge MORAN: No, sir; it was not in the bill of exceptions. Counsel has got a curious idea of a bill of exceptions. The bill of exceptions was not known in the common law—was not known in the criminal law. It is a creation of our statutes.

The COURT: It was created in England before it was here.

Judge MORAN: But it was not a common law.

The COURT: In the first place, you must show the discharge of the jury. That is a matter of record.

485 Judge MORAN: I cannot show all these things at once. I want to show what occurred.

The COURT: We are going along here presumably upon your introducing a record. I think you should introduce the record to begin upon, to know that we have got something to base it upon.

Judge MORAN: I have no objection relating to the order of it, if that is the point.

The COURT: You offer the record——

Judge MORAN: We have got the entire record here.

The COURT: —of the trial of this defendant. Show it to Mr. Barnes.

Judge MORAN: There is an order here dated the 31st of August. Of course, your honor knows only the orders made. "The hour of adjournment having arrived"——

Mr. BARNES: I object to reading it. Show it to me.

The COURT: Show it to Mr. Barnes, so he may have an opportunity to see whether he wishes to object or not.

(The paper was shown to Mr. Barnes.)

Mr. BARNES: Now, you offer the record.

Judge MORAN: I offer the record (referring to the record in the case herein upon the former trial of said case before the Hon. S. T. Howe).

Mr. BARNES: Of course you offer the entire record. Now, I object to the offering of the record, as it is immaterial and irrelevant to any of the issues in this case; and in offering the record I suppose it is understood, Judge Moran, that you are offering this record for the purpose of showing that the defendant has been once in jeopardy.

486

Judge MORAN: My purpose has not been concealed at all.

Mr. BARNES: I know; but am I right?

Judge MORAN: I think you are right for once, Mr. Barnes.

Mr. BARNES: It is a singular thing that we should ever agree.

Judge MORAN: Yes, sir; but you are right for once.

Mr. BARNES: Now, I think we can discuss the question of the materiality of this on this offer. For instance, I want to call the court's attention to a position we might be in here. When the counsel admits that I am right for once, it indicates that we have some acquaintanceship with one another, and I see upon the table here a long line of books, which are likely, if all read with the usual zest of my distinguished friend, knowing, as I say, his previous habits, it will take up the rest of this day, if not the rest of next week; and if the court lets in this piece of evidence here, and on the theory that it is to be followed up with other evidence, why, then, if counsel can make no headway before the court on that proposition he will take up the rest of the following week with the jury arguing the law. What I want is this: I want the court at this stage of the proceedings to determine the relevancy of this piece of evidence by the inspection of it, as to whether it has any tendency to show that the defendant has ever been once in jeopardy,
and then let the authorities be produced upon this point,
487 and then let us argue the question of law to the court. If
the court decides his way, it ends this case. If the court decides our way, then no question of fact goes before the jury, as it would if the record is in and if counsel exploited himself for a week or so before the jury on the question of law after he has been overruled by the court. There is my position.

Judge MORAN: Now, if your honor please, look at the attitude of this counsel. I presented a plea to his honor and invited a decision of this question upon a plea, and he moves to strike the plea from the files upon the express ground that it was admissible by evidence, and that was the proper way for me to raise that question.

The COURT: It ought to be said, I think, Judge Moran, that you stated that though I might decide the question the evidence would still be admissible here.

Judge MORAN: But I had to say so. You could not have struck the plea off the files on any other ground than that it would be admissible here. That is the ground. Now, if the gentleman has fallen into his own trap, he can stay there. We have had some contact before in this case, and either you or I have been educated in it. I leave you to say which one.

Mr. BARNES: It was more expensive to you than to me.

Judge MORAN: I will leave you to say who got their education.
One or the other of us has been educated in this case. You
488 tell the jury which one it was when you come to talk to them.
Now, I set this up in a plea and offered to prove it. I was willing to have it determined. On the gentleman's motion I am striving to put it in here and under your honor's ruling I am striving to put it in here. Now, I offer this order discharging the jury from the record of the 2nd of September, '99.

The COURT: Let me see the record.

(The record was shown to the court.)

Judge MORAN: This question is a question of fact for the jury. You have got to instruct the jury one way or the other.

The COURT: I think the record is admissible. The effect of it is another proposition.

Judge MORAN: Yes; your honor has to instruct on the effect of it. I will read this order in evidence:

"This day come the People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes, and also come the jurors of the jury. The jurors of the jury aforesaid, having now returned into court and being unable to agree upon a verdict, are thereupon discharged from the further consideration of this cause."

Q. Now, at the time that the jury came in and were discharged, what occurred here in the court—what was said by the prisoner's counsel and by the judge?

Mr. BARNES: That I object to.

489 Judge MORAN: It is very material to prove whether we objected to that discharge or not.

Mr. BARNES: If the court please, how would they have preserved any rights? Let us consider this proposition. Now, it is one proposition of law whether he is in jeopardy, even though they protest. That we don't reach now; but they claim Judge Moran asked the question, supposing they had excepted or protested to the discharge of the jury. How would it become known? By exception. How would the exception become known? By being made a matter of record. It was not made a matter of record, according to our practice, by being inserted in the order. How would it become so? By a bill of exceptions. Now, I don't care when the bill of exceptions began. I think I received a little information upon that before this morning, but I do recognize the fact that under the practice of our courts now in this day and generation we know nothing of the case in court excepting by the record, and if it does not appear in the orders of the court, it may be put in by a bill of exceptions duly signed by the court and certified during the term or within such period as the court may allow. Now, this record offered here does not show that they asked any bill of exceptions. It shows no motion for time within which to file a bill of exceptions. Now, is it to be said that they can come in here and virtually get in a bill of exceptions unsigned, which even the court could not sign at

490 this day without a memorandum of what occurred there, which the court could not even sign at this day, after the lapse of the term, without the court had entered an order enabling it to sign it within this period? Will it be said that an outsider, an auditor in the court-room, can come in and supply what they failed to get in by a bill of exceptions? That would be extraordinary. It would be in defiance of all rules of procedure and practice. Now, if it does not appear of record that the defendant protested or excepted to the entry of that order—and I will say this to the court right here: that it is absolutely immaterial whether he did or not, so far as the law is concerned; still we don't want anything which

is immaterial in here—if it does not appear in the record that they excepted, no bill of exceptions being a part of the record, how in the world can they get an exception in by an outside party at this time?

The COURT: Judge Moran, I suppose you are prepared to argue this question and have the authorities here?

Judge MORAN: Yes, sir; I have a large number of authorities.

The COURT: I am prepared to hear you, but I want, before commencing the argument, to state some things that suggest themselves to me. What you are in effect here proposing, what you are in effect contending, is this: that when this case was on trial before, at the close of the trial the presiding judge made a fatal
491 mistake, the effect of which was to amount to an acquittal of this defendant—that is to say, not technically an acquittal, but to place him in a position where he could never afterwards be tried for the offense with which he is charged in this indictment, and consequently never could be prosecuted upon it. Now, then, it appears from the examination of the record of the case, which is in evidence presented by you, that—it does not appear, I should say—it does not appear that the court did make any such mistake in this case at all.

Judge MORAN: I don't want you to say that in the presence of the jury. Let us discuss the question of law. I save an exception to that.

The COURT: It reads that way simply. Now, my present impression is that it does not appear by the record that the court made any such fatal mistake; but you are not content to abide by the record, because you are proposing to call witnesses to testify to what occurred here in court. You are not content to rest simply on the record. If you were, that presents one question; but you ask to show by witnesses outside——

Judge MORAN: Some of the things your honor is saying—not intentionally—are exceedingly dangerous on the question of fact. I would rather proceed to the discussion of the case.

The COURT: I merely suggest that for the purpose of—I
492 said that for the purpose of suggesting to you how it appears to me now. Now I am ready to hear from you.

Judge MORAN: This is a new question, one that has not been ruled upon by our supreme court. With reference to a bill of exceptions, how could the question arise on a bill of exceptions? How could the question of once in jeopardy arise on a bill of exceptions? It could only arise by a bill of exceptions to your honor's ruling. Here is the first time the ruling is made. It wasn't made then. It couldn't be made then. In all the line of authorities counsel will find, from beginning to end, he will never find a case where a bill of exceptions was taken. It cannot be taken. He was once in jeopardy when he was put there. The question is—he is twice in jeopardy. He was not twice in jeopardy until he was put in jeopardy by this jury. How could the question arise?

Mr. BARNES: I can show you where it was reviewed as a matter of

record. The Ohio supreme court held that the question was not a reviewable one.

Mr. AUSTRIAN: It arose in that case by correcting the record.

The COURT: Gentlemen, this will take some time, and I prefer that Judge Moran should not be interrupted.

Judge MORAN: The thing I want to show in connection with that is what occurred—that the prisoner and his counsel objected to the discharge of the jury in open court. Now, that is a competent
493 matter to show—that they refused to consent or assent to the discharge of the jury. That is what I want to prove by this witness. Now, if it does not amount to anything, why let it go after having had your honor's ruling upon it. We will have to take your honor's ruling upon it when we get through; but I want to make a case so as to take your honor's ruling, not upon a part of it, but upon all of it. Counsel seems to be afraid that the question as to how the jury stood as between themselves is a matter that probably should not be gone into. I don't intend to ask anything about that. That question I will come to later. I have doubt about that question myself, I say to your honor frankly, but I have no doubt about the question that I have a right to show what occurred in court in the presence of the court and jury at the time of the discharge.

The COURT: If you have authorities on the subject, I would like to hear them.

Judge MORAN: I think perhaps it would be well, your honor, to have this discussion in the absence of the jury.

(Thereupon, by direction of the court, the jury retired from the court-room, and counsel proceeded with the argument in the absence of the jury.)

494 MONDAY, *February 26th*, 1900—10.00 a. m.

Court met pursuant to adjournment; whereupon—

The COURT: I went on Saturday last to a law institute and made some examination of authorities upon this question which was argued here, and took some of the books to my house and spent some time there examining the question, and I think I am prepared to pass upon the question now.

In considering this matter, owing to the contrariety of opinions that have been expressed and the inharmonious decisions that have been rendered by various courts, it is well to take into consideration the history of trial by jury in this regard. Trial by jury has, like other human affairs, been an evolution. In the beginning it was imperative almost upon a jury that they should render a verdict, as well said by Cochran, chief justice, in the case reported in the 118th Eng. Law. Our ancestors were extremely tenacious, and that a verdict should be rendered by a jury, and they were entirely unscrupulous as to the coercive methods that might be employed to compel a jury to render a verdict. In all criminal cases in England some years ago and, I have no doubt, in many of the States of the Union years ago the oath administered to the bailiff when he took in charge a jury in a criminal case, when they were to consider as

to what their verdict would be, was that the jury should be kept
495 without meat or drink, fire or light, until they should have agreed on a verdict. Now, in view of our present understanding and our present condition, such a direction as that seems barbarous, and I may as well ask counsel here what would have been thought if on Friday night this jury would have been sent out with a bailiff so instructed and sworn so to do, and they had remained without anything to eat or drink Friday night, all day Saturday, Saturday night, and on Sunday night, having suffered the annoyance of darkness, the pains of hunger, thirst, and cold, they had then come in Sunday night and rendered a verdict of guilty. Might not the prisoner well have appealed to the court that that verdict was not the result of honest, careful, intelligent deliberation, but was brought about by the coercive influence and the directions of the court to its bailiff?

Now, we have still lingering in our statute a remnant of the old barbarism. Our criminal statute provides that when a jury retires to consider their verdict in any criminal case a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together, without meat or drink, water excepted, unless by leave of the court, until they shall have agreed upon their verdict. The oath is still administered, but I can say that in my court always in
accordance with what I understand to be the modern idea,
496 the intelligent idea of a more enlightened civilization and jurisprudence. Jurors and juries are always considered as intelligent, capable, reasonable human beings, to be accorded all the comforts and conveniences which can reasonably be given, but no attempt whatever is to be made to wring a verdict out of them by pains or inconveniences to which they may be subject; that they are to have their meals at regular hours at which people ordinarily have them, and they are to be allowed to go to bed and rise at such hours as they may determine, and it is well known at the present day we stand in an entirely different attitude—the law does and the court—from what existed in former years. We now look upon them as men who are asked not to merely render a verdict, but to carefully consider the evidence, the law, the instructions given by the court, and render a verdict in accordance with their reason, their judgment, and to have all the opportunity which reasonable human beings ought to have that they may carefully consider and a true verdict render in accordance with the law and the evidence; and so I say it is not strange that we should find many decisions in the court given under the influence and the ideas that once prevailed, to the effect that the jury cannot be discharged except under what is spoken of by judges as an absolute necessity.

Now, in an early day in this State the supreme court
497 passed not exactly upon the question here presented, but one which was very analagous. This was the case of Stone *vs.* The People, and is reported in 3rd Scammon, 326. It was a trial in which the defendant was charged with murder. A jury had been impanelled and sworn to try the case. After that was done it

was discovered that one of the jurors was an alien, and therefore under the law disqualified as a juror, but the jury had been sworn——

Judge MORAN: I have that authority here, your honor. That is manifest necessity.

The COURT: The jury was discharged. The defendant objected to the panel being filled with another juror. It was filled. The trial went on and the defendant was convicted. All these facts appeared before the supreme court, he insisting that the jury should not have been discharged against his objection and that the panel should not have been filled over his objection. The supreme court held different. That case has been commented upon a number of times by the supreme court. It was commented on in 3rd Scammon. It was also commented on in the case of Miller *vs.* Metzky, in the 161st Ill., 390, in which the court says, on page 393:

"The power to discharge a jury must of necessity reside in the court; otherwise," etc.

Judge MORAN: The rule announced there is applicable to a civil case.

The COURT: This case was a civil case they were passing upon, and it was further held that when any jury had been
498 impanelled, and when a party was for the second time put on trial, the plea of former jeopardy was not well taken.

In the 2nd Pickering, Commonwealth *vs.* Burgess, p. 520, the court says:

"Cases like this, which so manifestly show," etc.

A very recent case in England, comparatively, is the case of Windsor *vs.* Queen, which is reported in the 118th English Law Reports, p. 169. The year is 1866.

Judge MORAN: We have the common law from the 4th year of James I.

The COURT: That is quite true; but the later English decisions, so far as they pass upon law which is applicable to show our condition and upon the common law, are authority, although made since the period of which we speak of the common law.

I have a very large list of authorities which I will not take the time to read from, but counsel may have the benefit of the list if they care for it. I have examined in this connection Profax History of Trial by Jury, in which this subject is treated, sections 485, 490, and there is a very excellent citation of authorities, with some comments in the Enc. of Pleading & Practice, volume 11 or 12, under the title of Juries, and from all this, from these authorities and others, I am satisfied that the right to discharge a jury
499 when they are unable to agree is in all cases of felon- one which the court may properly exercise. I will say that quite a number of authorities hold that there is a distinction between cases in which the life of the defendant is involved, as cases of murder, and those in which the life of the defendant is not involved, and my attention was called, as counsel will remember, particularly the other day that substantially all cases in which it has been held that the discharge was improper where cases in which the life

of the defendant was involved, but there are authorities which treat of that subject distinctly and so hold that there is a distinction. It may be that there is, because we all know that there is a distinction even in our statute and running through the common law in a trial in which the life of a defendant is involved. Our statute makes a distinction—doubles the number of peremptory challenges the defendant may make.

I have no doubt from the examination I have made but what the case in which a jury are unable to agree is a case of necessity, and that the court can properly discharge a jury in such a case; that it does so in its discretion, and, as I said the other day, wherever a court exercises discretion, why that is a matter which may be reviewed for the alleged abuse of discretion and not otherwise.

Now, I find in the 67th Miss. a case in which apparently there is a question — as has arisen here being presented.

500 The court went on to allow evidence to be heard as to the time which the jury had been out and as to all that occurred in the jury-room. I don't think that can be done.

I am of the opinion that at this time in this proceeding this matter must be tried by the record; that the record was properly admitted, and it is a question of law presented to the court whether the record shows that there existed the necessity for the discharge of the jury. The record states that the jury was discharged because they were unable to agree. If the record did state simply that the jury were discharged I think that the prisoner—that such discharge would have been equivalent, so far as the rights and liberties of the prisoner are concerned, to an acquittal—that is, he could not have been put upon trial again. The record states that the jury were discharged because they were unable to agree; that, in my judgment, constitutes a necessity and is a question which cannot now be submitted to a jury to determine whether the court properly exercised its discretion.

Judge MORAN: Can it be now submitted to the court, your honor? Some cases hold that it may be raised on motion in arrest. I don't want to struggle with the court after the court has decided, but here is the difficulty it presents: There is no way of reviewing it in this kind of case. It is essential that the error shall be

501 injurious to him. If the court simply calls a jury in within twenty minutes after they have gone out and says, on the record, the jury, being unable to agree, are discharged, there would be manifest abuse. How are you going to review it unless you review it the next time, or rather review it as a mistake or error and let the prisoner go?

The COURT: Mr. Barnes, as I understand it now, the court is to pass on the circumstances which justifies such findings and order by the court—that the court shall pass upon it.

Judge MORAN: Yes.

502 Mr. MORAN: Now, I will offer to prove that after the jury came in the court asked the jury if they had agreed; the jury answered (the foreman speaking for them) that they had not agreed; that the court then asked them whether there was a

probability of their agreeing, and that the foreman answered that he did not think the jury could agree, whereupon the court made the order that has been offered in evidence here in the plea—we have got an exact copy of the record in our plea—that is, that the jury, being unable to agree, are discharged, and that then and there the counsel for defendant objected to the court's discharge of the jury, and whether they accept it or not I don't know.

Mr. BARNES: I think not.

Mr. MORAN: You think they did not?

Mr. BARNES: I do not recall it; I couldn't say.

Mr. AUSTRIAN: They objected, and then the court adjourned.

The COURT: I understand the People say that several jurors were asked if they thought they could agree and several of them said they thought they could not.

Mr. MORAN: Well, I would like to have the evidence go in on my offer.

The COURT: Yes; now, I am inclined to think you may show that.

Mr. AUSTRIAN: What?

The COURT: What you say, and the counsel for the People may show what they say occurred, if they can—on your motion,
503 understand you; it must be on the same motion. You move to amend the record?

Mr. MORAN: No; I offer to show that to the court without any motion whatever. I don't care what the motion is—motion to discharge.

The COURT: Well, upon the motion to discharge, the motion must be a motion to amend the record, and, if you do not make that, the court denies your motion.

Mr. MORAN: Well, I will save an exception to that. The motion I now make to the court is to discharge the defendant upon this record, supplemented by this evidence that I offer, upon the ground that he was twice in jeopardy.

The COURT: The motion is denied.

Mr. MORAN: Exception.

The COURT: Well, is there nothing further, then, now?

Mr. BARNES: Well, this motion should be, I suppose, in the presence of the jury, should it not?

Mr. MORAN: Well, we will make the motion to amend this record and put this evidence in.

The COURT: To amend the record in what respect?

Mr. MORAN: In respect so as to show the exact facts that did occur, which facts, I say, I repeated to your honor.

Mr. BARNES: How do you want the record to read?

The COURT: That is to say, you want to amend the record in so far as omitting the jury were unable to agree?

504 Mr. MORAN: Show what was said. I want to amend the record by showing what was said—that the court came in, called in the jury, asked them that, the foreman said he thought they couldn't agree, and then that he directed this order to be entered—finding.

The COURT: That motion is denied, and let there be no misunderstanding. I am of the opinion that upon moving to amend the record in so far as it recites that "The jury being unable to agree"—I think it is?

Mr. AUSTRIAN: Yes; your honor.

The COURT: I do not understand it to include that the jury were discharged. I don't suppose you want to amend that portion?

Mr. MORAN: No, sir.

The COURT: That if you wish to make a motion to amend the record in so far as it recites "The jury being unable to agree," I will entertain the motion and hear your evidence and the People's on it.

Mr. MORAN: I will save exceptions to your honor's ruling. I will move to amend the record so as to strike out the words, the finding, that the jury were unable to agree; let the rest of the record stay.

The COURT: I will hear your evidence and hear the People's evidence.

Mr. MORAN: Hear it now, your honor?

The COURT: Well, if you can get through with it in five
505 or ten minutes.

Mr. AUSTRIAN: We can, your honor; we have only one witness.

ALFRED S. AUSTRIAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. MORAN:

Q. Give your name.

A. Alfred S. Austrian.

Q. You are a lawyer?

A. Yes, sir.

Q. Were you assisting in the defense of E. S. Dreyer in this case before Judge Hanecy last August? And, if so, state about the date.

A. The trial began on or about the 29th of August, 1899. I was assisting.

Q. You were assisting?

A. Yes.

Q. Now, were you here when the jury went out to consider on their verdict?

A. I was.

Q. What day was that?

A. On or about the 1st of September. I should say accurately on the 1st of September, 1899.

Q. What time of day did the jury retire?

A. About four thirty or four forty in the afternoon.

Q. Were you here the next morning when the jury came in?
506 A. I was.

Q. What time was the jury called in?

A. About the hour of nine thirty or nine forty-five; between those two hours, I should say.

Mr. MORAN: Now, I want to offer, for the sake of a ruling, what occurred in the presence of the court. I understand your honor rules it out, but I want to make the offer.

Q. Before the jury were called in, after the court had taken his seat upon the bench that morning, was there any conversation by the court with the counsel for the defendant?

Mr. BARNES: Wait a minute. That is objected to.
Mr. MORAN: Well, I understand his honor ruled this out.
Mr. BARNES: Well, I object.
The COURT: I do not think it is admissible.

Mr. MORAN:

"Q. Was there any conversation?" I suppose that part would be admissible without the other?

The COURT: Yes.

A. There was.
Mr. MORAN: State what it was.

Mr. BARNES: I object.
Which objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN: Now, I offer to prove that the judge called counsel—attorneys for the defendant—up in front of his desk and said to
507 them, "I understand this jury has not agreed; I am going to discharge them."
The COURT "I understand this jury" has what?
Mr. MORAN: "Has not agreed; I am going to discharge them;" and Mr. Forrest, counsel for the defendant, objected to the court doing so. That the court said, "What is your objection?" And Mr. Forrest said, "I object because there is no necessity for discharging the jury; and secondly, I always like to fight to a finish." Now, the court rules that out?
The COURT: Yes.
To which ruling of the court in ruling out the offer of evidence the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. Now, when the jury came in, what, if anything, did the court say and what, if anything, did any juror reply?
A. I cannot repeat the words verbatim, but the substance, quite clearly,—the colloquy between the court and the jury was—follows: Judge Haney turned to the foreman of the jury and asked him the question, "Mr. Fry, are you the foreman of the jury?" to which he replied that he was. "Mr. Fry, have the jury arrived at a verdict or agreed upon a verdict?" Mr. Fry replied, "We have not." Judge Haney says, "Have you discussed the questions in the case among yourselves?" Mr. Fry says, "We have, your honor." Judge

Hanecy said, "Do you think you can arrive at an agree-
508 ment?" to which Mr. Fry replied, "I believe not, your honor;" and thereupon Judge Hanecy turned to the jurors and said, "Are you of the opinion?" to which no reply was made.

Mr. BARNES: "Are you of the same opinion?"

The WITNESS: "Is that your opinion?" or "Are you of that opinion?" to which no reply was made. Thereupon Judge Hanecy said—thanking the jury first for their attention and consideration of the case, both in behalf of the court and the People—stated: "Gentlemen of the jury, you are discharged from further service;" to which both Mr. Forrest and myself objected, objected to the discharge, Mr. Forrest objecting upon the ground—he objected and then——

The COURT: Well, I don't think the objections you put in are an amendment to the record. They would not have gone into the record proper, but would have gone into the bill of exceptions.

Mr. MORAN: Well, I don't regard the objection as so material. The rule is it cannot be done without the consent of the prisoner.

The COURT: I understand, but we are talking about amending the record. Now, there wouldn't be anything in the record naturally that you objected to.

Mr. MORAN: Some of these cases——

The COURT: I know, but the proper way is by bill of exceptions.

Mr. MORAN: Well, some of these cases show the objection
509 of counsel to it. I know the rule says it cannot be done without the consent of the defendant. Well, that is all.

The WITNESS: Does your honor say not to answer as to the objection?

The COURT: I merely say that I would regard that such evidence as that would not be pertinent upon this motion to amend the record, which cited that the "jury being unable to agree."

Mr. MORAN: Was there any complaint by any of the jurors of sickness or disability of any kind?

Mr. BARNES: That I object to, what was said.

Mr. MORAN: That is what I mean. Was there any complaint of that kind—anything of that kind said by the jurors?

The COURT: Yes; or anything else said by any of the jurors other than what you have stated?

A. No, sir; certainly no complaint, Judge. Of course, I can't say whether the jury thanked the court for the kind words he said to them or something of that sort, but nothing material to the case.

Mr. MORAN: Were the whole twelve here? Did they appear physically all right?

A. Yes, sir.

510 Cross-examination by Mr. BARNES:

Q. Mr. Austrian, isn't it a fact that Mr. French, of the jury, also told the court that the jury could not agree?

A. I should say, to the best of my recollection, which is quite accurate on the subject, no.

Q. But you do not remember whether he did or not?

A. Calling on my recollection, I would say no; I wouldn't swear that he did not.

Q. Wouldn't swear that he did not?

A. No.

Q. When the court turned to the rest of the jurymen and asked them if that was their opinion, isn't it a fact that several of the jury nodded?

A. I couldn't say yes or no, Mr. Barnes. I am quite certain, though, that no verbal reply was made.

Q. Did you look at the jurymen?

A. I have not that accurately in mind; don't know whether I did or not.

Q. Do you know whether the judge looked at the jurymen?

A. I presume he looked at them while talking to them, I should say.

Q. Do you know whether the judge received any communication from the jury that they could not agree?

A. From what the judge said——

Q. Do you know whether or not he received any?

A. No; I do not.

The COURT: That is, you mean any communication before
511 the one received in court?

Mr. BARNES: Yes.

The WITNESS (to Mr. Barnes): You told me—you told me that you had telephoned to the judge during the night. I don't know what your communication was.

Mr. BARNES: Well, I don't remember what it was, either, but I certainly did not discharge the jury.

Mr. AUSTRIAN: I don't know what information you had.

Mr. MORAN (to Mr. Barnes): Did you ask the judge to discharge them the next morning when he came in court?

Mr. BARNES: No; I did not do that, either.

Q. Did you know how the jury stood when the court discharged them?

A. I did not. You had told me, however——

Q. Did you?

A. You had told me, however, that the jury stood six to six.

Q. Yes. When did I tell you that?

A. During the course of the evening. You said that that was what you had heard or some——

Q. "There is a rumor," I said, didn't I?

A. Yes; that is what you told me.

Q. I did not tell you that I had any authentic information on the subject?

A. No; I don't know whether your information was authentic or not.

The COURT: Usually we read in the newspapers how the
512 jury stood.

The WITNESS: I read in the newspaper next morning that

it stood eleven to one in favor of the State for conviction. I knew that was not so.

Mr. BARNES:

Q. How did you know that was not so?

A. Because we talked to the jurors after they were discharged and understood they stood six to six when they first went out for five hours, for a number of hours, one at a time, until they stood nine to three for acquittal, when they were discharged.

Q. Did you talk with a man from the Edison Company and learn from him that he had failed in business, and that he went into the corner and took each one of the jurors, one by one, that differed with him, and read to him particularly the defendant's instructions? Did you learn that from him?

A. No, Mr. Barnes; but I will tell you what I did learn.

The COURT: It seems to me this is not——

The WITNESS: I heard——

The COURT: I don't think it is necessary to go into all those things.

Mr. MORAN: As I said——

The COURT: I don't think — anything material here at all except what occurred in open court in the presence of the court and jury. Well, anything else, Judge Moran?

Mr. BARNES: I want to ask one question, Mr. Austrian.

Q. Did your stenographers—did you have any stenogra-
513 phers taking down what was said in court at that time?

A. Yes, sir.

Q. Have you got their minutes here?

A. I have not their minutes. I have——

Q. Have you looked up their minutes?

A. I have.

Q. And you have not got them here?

A. No.

Q. Have you had them written up?

A. I have. Would you like them produced?

Q. And what you state is from those minutes?

A. No; what I state is merely from my own recollection, except as I modified it by telling you and the court certain points upon which my memory might not have been accurate.

Mr. MORAN: Do you want to put in any evidence on the other side?

Mr. BARNES: Is that all you are going to put in? You put in your case first.

CHARLES A. KUHN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. MORAN:

Q. What is your name?

A. Charles A. Kuhn.

Q. Were you a juror at the trial of Dreyer in this court——
514 A. Yes, sir.
Q. In August or the beginning of September last?
A. Yes, sir.
Q. Did you sit as one of the jurors?
A. Yes, sir.
Q. What time did the jury go out?
A. About half past four in the afternoon.
Q. What time did the jury come in in the morning?
A. Somewhere around nine thirty in the morning.
Q. What was the condition of the jurors physically—as to being well or ill?

Mr. BARNES: That I object to.
The COURT: I do not see that that is the question here.
Said objection on behalf of the People was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.
Mr. MORAN: Well, that is all.
(Cross-examination waived.)
The COURT: Well, anything further?
Mr. MORAN: We have the stenographer's transcript here, which I regard as the best on anything of that kind. We will put in the stenographer's transcript.
Mr. BARNES: I want to demur to your evidence.
The COURT: Well, are you through, Judge Moran?
515 Mr. MORAN: Yes; except that I want to put in the stenographer's evidence, by swearing the stenographer, that it is correct. I have not seen that transcript myself, but I am willing to stand by it.
Mr. BARNES: Do you expect to show anything else except what is shown here?
Mr. MORAN: Substantially what is shown here.
Mr. BARNES: Well, I demur to the evidence.
The COURT: Well, I do not think the evidence is sufficient to warrant the court in making a change—in ordering an amendment to the record. There are several things to be considered about this. Of course, as I said before, this is a matter which is submitted to the discretion of the court. Now, then, how the court regards the thing—Judge Haney, how he regarded the thing, or what information he had, or how he viewed the condition of the minds of the jury, or what discussion they had made and the probability of whether they could agree upon it--we have here the evidence of what appeared before him, but upon what his judgment was formed we cannot say, except that was before him. What I say is that — what was operating in his mind we cannot say anything, except while this was presented before him. And now I do not think that was sufficient to warrant this court in saying that the record made at the time was incorrect, and therefore should be amended.
516 Consequently the motion to amend the record is denied.
To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES: I want to say, Judge, I will want—I do not suppose the motion is really before the jury, but I shall make a motion to strike out this record from the evidence, because it is offered, in the first place, to see whether it tends to show that the defendant has been once in jeopardy. Now, if the record does not tend to show that—there is nothing on the record to show that he has been once in jeopardy—it should not go before the jury. Your points are preserved just the same. In other words, I do not think it is a matter to be argued before the jury. Of course, if that record remains in evidence, there is nothing to prevent the argument of this entire question before the jury.

The COURT: You mean the written record?

Mr. BARNES: Yes; I move to exclude it from the evidence. I suppose I should make the motion in the presence of the jury, because it was offered in their presence and received, and it was promised at the time it was offered that they would follow it up. The court took it in under that theory. Now, what place has it? No question of fact—no question of fact arises here, excepting that he was tried and discharged. Now, the materiality of that record would be to show that he had once been in jeopardy, but
517 if the court, upon once inspecting the record when it is offered, says, "What is the purpose of offering this record?" To show that the defendant has been in jeopardy; and the court looks at the record and says, "There is nothing here to show he has been in jeopardy." Why should it be received? For the express purpose of going before the jury on the subject. It becomes a question of law; it is not a question of fact. It may become a question of fact if you are going to leave it in, because then the jury, being then the judges of the law as well as the facts—Judge Moran can take this row of books here and entertain them on this proposition, but it strikes me it is like any other piece of paper—the materiality of it for the purpose for which it is offered is to be determined by the court. If it does not show or tend to show that the defendant has been in jeopardy, why, what is the principle here? They have it in evidence that they offer that record. They preserve their point of law. Now, if there is anything there that shows or tends to show the court has admitted it now and heard all the evidence that has been heard on the question of jeopardy, it becomes a question of law. The court can instruct this jury that the record introduced in evidence for the purpose of showing the defendant was once in jeopardy does not constitute a jeopardy under the constitution and laws of this
518 State. The court can so instruct the jury.

Mr. MORAN: May it please the court, that evidence is in, and as seen in these papers where it is in, it has got to be dealt with by an instruction that your honor will give on what you deem to be the law. I have a right, as counsel says, to argue the law to the jury. I do it with very great reluctance in any case—the right to argue the law to the jury—the jury being the judges of the law themselves.

The COURT: Well, the only thing you would have to argue before the jury would be the record itself; you would not have this ex-

trinsic matter. I think the jury evidence should be put in when the jury is here.

Mr. BARNES: Yes, and Mr. Bachrach will have to be here, I suppose, because the record, as I remember it, lopped off on the question of what occurred in the room, and that would have to be passed upon by the court before the jury.

The COURT: Well, I suppose Mr. Bachrach can be here this afternoon.

Mr. AUSTRIAN: Well, I told him that was all. However, I will have him here.

Mr. BARNES: I don't know as it is necessary to have him here.

A recess was here taken to 2.30 o'clock p. m.

519 2.30 P. M.

Court met pursuant to adjournment, whereupon, the jurors having returned into the jury-box, the hearing of the case was resumed as follows:

Mr. BARNES: Starting at the point of departure, will the stenographer read the last question?

(The question was read, as follows: "Q. What took place here, in court, when the jury was discharged?")

Mr. BARNES: There was an objection.

The COURT: Well, the objection is sustained.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. BARNES: That ends Mr. Bachrach as a witness?

The REPORTER: Yes, sir; so far as the testimony is concerned.

Mr. BARNES: I think I will defer the other motion, perhaps, until after you have finished your witnesses.

520 CHARLES C. COCHRAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full, please.
A. Charles C. Cochran.
Q. What is your business?
A. Well, teacher by profession.
Q. How long have you resided in Chicago?
A. Twelve or fourteen years.
Q. Do you know E. S. Dreyer, the defendant here?
A. I do.
Q. How long have you known him?
A. Since about the year '86.
Q. Do you know what his character—what his general character was up to December 19th, 1899—when the bank failed?

Mr. BARNES: Wait a minute, I object.

Judge MORAN: '96, I mean.

The COURT: His general character?
Judge MORAN: For honesty.
The COURT: And integrity.
Judge MORAN: Honesty and integrity I mean.
Mr. BARNES: I object to the form of the question—character.
521 The COURT: The question may be answered.

A. Very good, sir.

Cross-examination by Mr. BARNES:

Q. Mr. Cochran, do you know what his general reputation has been for truth, integrity, and fair business dealings in the community up to the first of January, 1899?

Judge MORAN: I object to that if the witness is to take into consideration any newspaper reports of anything of that kind growing out of the facts giving rise to this indictment.
Mr. BARNES: I don't ask him for any knowledge of newspaper reports. I ask his general reputation.
Judge MORAN: Well, general reputation based upon anything—any facts preceding on which this indictment is based.
Mr. BARNES: Well, I ask the question, if he knows.
The COURT: I think the question may be answered.
Objection overruled; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. I would like to hear the question again, if you please.

(The pending question was read.)

A. Well——
Q. Yes or no?
A. Without any explanation?
522 Q. Yes, sir.
The COURT: You may answer it yes or no, and then if you desire to explain your answer you may do so.

A. I would rather have had the word character in the question on cross-examination, instead of reputation.

Mr. BARNES:

Q. You would rather have had the word character?
A. Yes, sir.
Q. Now, answer first as to reputation.
A. Well, I don't consider character and reputation as *a* synonyms.
Q. I didn't ask you what you considered. I am asking you a plain question.
A. Yes, sir.
Q. That may be answered by yes or no—whether you knew what his general reputation was, what people said about him in the community in which he lived as to honesty and fairness in his business dealings.
A. Up to the present time?

Q. No; up to January 1st, '99.
A. It is rather a puzzling question to me. I have taken——
Q. Well, do you know? That's the question.
A. Well, I don't know whether I do or not. I don't know how the public—how the reputation among the public is. I haven't been among them enough to know. My estimation remains the same.

Q. It is not what your estimation is. Were you giving
523 evidence before of your estimation in answer to Judge Moran?
A. Of my personal knowledge of his reputation in the community before.
Q. Then, you were not giving——

Judge MORAN: He says his personal knowledge of his reputation in the community.

Mr. BARNES: Then, you were not testifying as to his reputation, but as to your personal knowledge. Is that correct?
A. I was testifying as to his reputation in the community.
Q. Reputation?
A. And his character—that is, character if reputation means the same thing as character in the community.
Q. You are a school teacher, you say?
A. Yes, sir.
Q. How long have you been a school teacher?
A. Forty-three years.
Q. You must know what the word reputation means, then?
A. Yes, sir.
Q. You know the distinction between reputation and character, do you not?
A. Yes, sir.
Q. Now, when you testified in response to Judge Moran's question were you testifying to reputation or character?
A. Both at that time.
Q. Now, confine yourself in the answer to my enquiries as to reputation. What was his general reputation in the community
524 for honesty and fairness in his business dealings up to January 1st, '99?

Judge MORAN: I object to that because it compels the witness to take in, if he answers it, newspaper reports and other opinions based by people on the facts giving rise to this prosecution.
The COURT: Objection overruled. It compels the witness to take in whatever conduces to and makes a man's reputation.
To which ruling of the court the defendant, by his counsel, then and there duly excepted.
The COURT: That is, the question is whether he knows in the first place or not. He can answer that yes or no.

A. I have not been in the community enough or conversant enough to know what the people think of him since the failure of the bank here.

Mr. BARNES: Have you known what his reputation was since that time up to January first, '99?

A. I cannot see that it has changed a particle.

Q. You have not heard his reputation discussed since that time; isn't that it?

A. Not much; no, sir.

Q. Have you any?

A. A little.

Q. When you heard it discussed was his reputation for honesty and fair dealing questioned?

A. I heard it discussed once by a gentleman who had an amount in the Dreyer bank and lost something, and he seems to have the same confidence in him now that he had before.

Q. You understand what a direct question is, do you—you
525 are a school teacher?

A. Well, this is the first time I have ever been in court as a witness, except as an expert witness, and I may be a little green.

Q. Are you an expert on reputations?

A. No, sir; I am not an expert on reputations.

Q. Now, will you kindly answer the question directly whether you have learned or known of his reputation in the community since December 19th, '96, at the time of his failure, up to January 1st, '99?

Judge MORAN: I object to that.

Mr. BARNES: As to his honesty and integrity in business matters?

Judge MORAN: I object to that.

Mr. BARNES: The question is whether you have known that reputation.

The question was objected to by counsel for the defendant; which objection was overruled by the court; to which ruling the defendant, by his counsel, then and there duly excepted.

Q. Yes or no; please answer. That is a direct question.

A. I don't believe I can answer that question either yes or no, without an explanation, conscientiously under the oath that I have taken.

Q. You can conscientiously answer the question whether you knew it before '96, can you?

A. Yes, sir.

Q. You knew his reputation before then?

A. Yes, sir.

526 Q. You know what his reputation is after that up to January 1st, '99?

A. If I am to take into consideration, I want to know——

Q. No; I want an answer to my question. I don't want a speech.

A. I would like to know whether I would be allowed to explain it after I answer yes or no.

The COURT: Yes; you will.

Judge MORAN: The court has told you you may.

A. That's all I want to know.

Mr. BARNES: Now, I ask you the simple question——

A. I would like to hear the question again.

Q. The simple question, now, is whether you knew what his reputation was in the community for fairness and intregrity in his business dealings after the failure, on December 19th, 1896, up to January 1st, '99. That's to be answered yes or no.

Judge MORAN: I save an exception to that, your honor.

A. I will——

Mr. BARNES: No, no, no. The question is, first, if you know it. Yes or no?

A. (To the reporter:) Read the question to me again.

(The last question was read as follows: "The simple question now, is whether you knew what his reputation was "——)

The COURT: What his general reputation was?

Mr. BARNES: Yes, sir; general reputation.

527 (The reporter continued reading the question as follows: —" general reputation in the community was for fairness and integrity in his business dealings after the failure, on December 19th, '96, up to January 1st, '99. That is to be answered yes or no.")

A. I cannot say that I know.

Q. You don't know?

A. What the community thinks about it. That means reputation.

Q. Yes, sir; general reputation. You did not?

A. I don't think I know.

Q. Do you live in the same place that you did prior to December 19th, '96?

A. Yes, sir; the same place.

Q. You knew his reputation before that?

A. I did.

Q. But you don't know it since? Is that right?

A. I——

Q. Yes or no?

A. Yes, sir.

Q. You do know?

A. If I am allowed to explain it.

Q. Well, you know it if you are allowed to explain it, and you don't know it if you are not allowed to explain it?

A. No, sir; I can answer your question either yes or no with an explanation.

Q. Well, sir, which way will you have it, yes or no, with an explanation? Which way will you have it with an explanation, yes or no?

528 A. Yes.

Q. You know his reputation with an explanation?

Judge MORAN: Well, give your explanation, if you want to.

Mr. BARNES: Give your explanation.

A. If I am to take into consideration the charges that have been made against Mr. Dreyer and the issues that arise from those charges

under the present indictment, and consider that they are true in advance of a verdict of the jury, I say his reputation is good until the jury has decided on those issues.

Q. In other words, you would like to decide this matter for the jury?

A. No, sir; I would not like to condemn a man, not until he has been tried by a jury of the land.

Q. Now, I will ask you this question, after having made your explanation of Yes; you knew his general reputation during the period mentioned: Now, state whether his general reputation in the community from December 19th, '96, up to January 1st, '99, was good or bad.

Which question was objected to by counsel for defendant.

Q. For honesty and integrity in his business dealings.

Which question was objected to by counsel for the defendant; which objection was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

The COURT: That period of time was covered by your questions.

529 Judge MORAN: No, sir.

Mr. BARNES: No; it was not. Their question was up to December 19th, '96. We ask it from December, '96.

The COURT: I didn't understand it. I thought you covered the same period as the other day.

Mr. BARNES: He asked for his general reputation for a certain period.

Judge MORAN: Up to December 19th, '96.

Mr. BARNES: That's true, and we ask for it for a later period.

Judge MORAN: They ask for the reputation; they are asking for the reputation created by the facts that underlie this prosecution. Now, is that admissible at all?

The COURT: I don't think it is admissible from this witness, if you restricted yourself.

Judge MORAN: Counsel agrees that I did.

The COURT: Then I don't think it is competent.

Mr. BARNES: Very well; if the court thinks that, I cannot ask his reputation, because they did not on the direct examination.

530 ALBERT L. SERCOMB, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. What is your name?
A. Albert L. Sercomb.
Q. You live in Chicago?
A. I do, sir.
Q. What is your business?
A. Silverware.
Q. Silverware? Do you know the defendant Dreyer?

A. I do; yes, sir.
Q. How long have you known him?
A. Fifteen years.
Q. Had business relations with him?
A. Some.
Q. Do you know his general character for honesty and integrity in the community?

Mr. BARNES: Well, of course, if those questions are asked now as to character being synonymous with reputation, which it is not, which all courts hold it is not, then I have no objection, providing the jury understand that the use of the word character is synonymous with the use of the word reputation, and each witness so understands it; but if we are to depart from the usual forms of questions that have been observed from the days of the common law to the present time without exception that the only form of question is, Do you know his general reputation in the community? then that question should be asked, then we should understand whether we are
531 departing from the precedence and practice of the courts from time immemorial or not; but I have no objection if the counsel uses the word in the sense of reputation and the witnesses and the jury understand that.

Judge MORAN: The supreme court of this State have decided that the rule is, What is the general character of the party? Now, your honor decided that the other day. General character means what generally people in the community say about a man; how they regard him. Counsel heard your honor's ruling upon that the other day, and takes this occasion to make a speech.

The COURT: Well, the other day I understood you to say you asked for character as synonymous with reputation. I don't regard it so. I think Mr. Cochran was correct in making a distinction between the two, and unless you don't—if the witness does not treat them as synonymous, then the question should be reputation, What is his general reputation?

Judge MORAN: Well, your honor decides I cannot ask the other question?

The COURT: Yes, sir; unless the witness understands it as some people do. I don't intend to sit up here and pass upon the significance which witnesses shall give to particular words. Many men use the same word with a different understanding of it. If he is testifying considering that character, as the word is ordinarily
532 used, that he means by that what people ordinarily say about him, which is the real thing we are getting at, you may use the word character, but not to use the word character as signifying from what the man really is as contradistinguished from what people say about him.

Mr. BARNES: Wouldn't it be better than to follow the usual form of question? Because in each instance, your honor, we have got to ask the question of the witness whether he is using character in the sense of reputation. We know that by a long course of decisions there has been a wide demarkation between the two things, reputation and character.

The COURT: I don't think we do know it by a long course of decisions. On the contrary, you will find an abundance of authorities who speak of reputation and character as synonymous.

Judge MORAN: Our supreme court uses it in nearly all cases where they have talked about it.

Mr. BARNES: In this sense: that you can prove a man's character by proving his reputation, but in no other way.

The COURT: What the witness only can testify to is what people ordinarily say about him in the community—that is, what is generally said about him.

Judge MORAN: I insist that the question is, What is the defendant's general character? I put it so to this witness. Counsel objects to it. Now, will your honor rule upon that question?

533 The COURT: Unless the witness is to testify to it as synonymous with reputation the question should be, as it almost always is, What is his general reputation in the community where he lives and where he does business?

Judge MORAN: I will take your honor's ruling upon it and then conform with your honor's ruling. I want a ruling square upon the point when I ask this question, What is his general character for honesty and integrity?

The COURT: Well, let that question be ruled out. You don't seem to want to put it as usual.

Judge MORAN: Very well, I save the point.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. Do you know what his general reputation for honesty and integrity in the community is?

A. Up to the time of the forced failure of E. S. Dreyer & Co. Mr. Dreyer's name on any paper or petition——

Q. Well, you have got to answer the question.

The COURT: You are making a speech.

Judge MORAN: Was his reputation good or bad?

The COURT: The question is, Do you know his general reputation? Answer that yes or no.

A. Yes, sir. It was good.

Judge MORAN:

(Q.) Was his reputation for honesty and integrity good or bad?

A. Good.

Q. You say you only know his reputation up to December

534 19th, '96, which was the time of the bank failure?

A. No, sir; I have known his reputation up to date.

Q. You do? Is his reputation good or bad?

A. His reputation is good.

Cross-examination by Mr. BARNES:

Q. Do you say his reputation up to January 1st, '99, was good for honesty and fair dealing in his business transactions?

A. That's what I said.

Q. What is your business?
A. I am manager of the International Silver Company.
Q. You know Mr. Dreyer personally and intimately?
A. I have.
Q. For 15 or 16 years?
A. Yes, sir.
Q. Have you heard what was said about him in the community since December 19th, '96; generally said about him and about his business transactions?
A. I have.
Q. About his honesty and integrity up to January 1st, '99?
A. I have.
Q. Do you know his general reputation in the community for honesty and integrity during that time—not your and his other particular friends' special opinions, but his general reputation—not their opinions, but his general reputation in the community?

Judge MORAN: A man can only know his reputation——

535 Mr. BARNES: If the question is objectionable, then object to the question.

Judge MORAN: I object to the question because the counsel undertakes to limit it to what no witness can know. He can only know it from the people he hears speak about it.

The COURT: That may be entirely insufficient to authorize a person to speak. The question is first whether he knows his general reputation, and that he answers.

Judge MORAN: Does your honor mean to rule that he has got to take into consideration what people say he has never talked with?

The COURT: He has got to take into consideration what people generally say about him.

Judge MORAN: What people say that he has not heard talk about it?

The COURT: Yes, sir; the majority, what people generally say about him.

Judge MORAN: What is generally said about him that the witness has heard said among the people who have talked to him.

The COURT: What is generally said in the community among his associates or people with whom he does business.

Judge MORAN: That will do; among his associates and the people with whom he does business.

536 A. Is that the question?

Mr. BARNES (to the reporter): What is the last question?

(The last question was read as follows: "Do you know his general reputation in the community for honesty and integrity during that time—not your and his other particular friends' special opinion, but his general reputation—not their opinion, but his general reputation in the community?")

A. I don't understand the question.

Judge MORAN: That is to be modified by what the court said—among his associates and persons with whom he does business.

A. All I can tell is what has been told to me. We have talked it

over. There has been many times that people—others—didn't agree with me; that's a fact.

Mr. BARNES: They did not think he was honest. Is that what you mean?

A. Why, there is always a class of men that are ready to kick a man when he is down.

The COURT: In this matter you should not start to make a speech. You are simply to answer this question—whether you know what his general reputation is—that is, what people generally said about him in the community where he lived and where he did business; the people among whom he moved and who knew him.

537 A. It was good.

Judge MORAN: I have two Illinois cases on this question——

The COURT: On that matter of character I think—I haven't any question of doubt—that the only proper question, unless it is qualified by saying that you mean the same thing as reputation, is his reputation—what is his general reputation; what people generally say about him. I have read those cases, and I know how the court has time and time again used "character" and "reputation" as synonymous.

Judge MORAN (reading): "Uniform good character," the "good character of defendant."

The COURT: Yes, sir; they have used it over and over again.

Judge MORAN: Good character—that is admissible on the part of the defense.

Mr. BARNES: As used how; showing reputation?

The COURT: The majority of people use the word character as meaning reputation—what people generally say. That man's good character; everybody says he is an honest man.

Judge MORAN: Your honor's ruling on this is, to my perception, but partly right; but you must concede this fact: that it is a proper answer to the question "What's a man's general character?" for the witness to say that he never heard it questioned.

The COURT: Undoubtedly.

Judge MORAN: That is not reputation at all; that is what people say.

538 The COURT: That is no doubt the case, but that arises largely from the law, which presumes that every man that is put upon trial charged with a crime that his general character is good, and consequently if there is nothing said about it the presumption stands.

Judge MORAN: Well, that is not an answer to the question. The question when it is put may be answered that way.

The COURT: Undoubtedly it may be.

Judge MORAN: It is a perfectly good answer.

The COURT: And this witness may indicate who he heard speak about it.

Judge MORAN: He said he never heard it questioned. That is a perfect answer to the question.

The COURT: That is not the case with this witness. A man may answer who and then his first answer will stand.

Judge MORAN: I am just suggesting this to show that this thing about the talk to him is not the thing. Have you got through with this man, Mr. Barnes?

Mr. BARNES: Yes, sir.

539 LUTHER LAFLIN MILLS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full.
A. Luther Laflin Mills.
Q. Mr. Mills, what is your business?
A. I am a lawyer.
Q. Were you at one time State's attorney of this county?
A. I was.
Q. Do you know the defendant, Edward S. Dreyer?
A. As a citizen and a man I have known him for 25 years, about.
Q. Do you know what his reputation in the community is; his general reputation for honesty and integrity?
A. Up to what time?
Q. Well, up to—you may take it as up to the time of the failure, when the newspapers began to talk about him.
A. I do.
Q. What was that reputation, good or bad?
A. Good.

Cross-examination by Mr. BARNES:

Q. Well, do you know what his general reputation for honesty and fair dealing in business matters as a banker and real-
540 estate man, the business in which he was engaged, was after the time of his failure, in December 19th, '96, up to January 1st, 1899?

Judge MORAN: I object to the question.

The COURT: Objection sustained.

Mr. BARNES: He asked him the general question, and the witness asked, "Up to what time?" Well, he says, you may answer first up to the time of the failure.

The COURT: Yes, sir.

Judge MORAN: He did not answer the second.

Mr. BARNES: But you asked him first if he knew his general reputation, and he said he did. Now, you asked him a part of the time. I have a right to ask him the rest of the time.

The COURT: I think not.

JOSEPH PFIRSHING, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full.
A. Joseph Pfirshing.
Q. What is your business?
A. I am an attorney-at-law.
Q. How long have you been in business in the city?
A. Well, a little over 26 years.
541 Q. Do you know the defendant Dreyer?
A. I do.
Q. Did you have business relations with him?
A. Yes, sir; a great deal.
Q. Did you lose any money in his bank?

Which question was objected to by counsel for the People.

The COURT: That is not a proper question.

Judge MORAN: I think, your honor, that question, under the circumstances of this case——

Mr. BARNES: Then we can call a number of men that did lose money in the bank.

Judge MORAN: Yes, sir; you can. We can call this witness as to his general reputation as an honest man. I wish to prove his reputation by this man as an honest man. I think that it makes a great difference where a man has lost money in his bank and still swears that he is an honest man—that he knows him to be an honest man. I think a circumstance of that kind will have an effect. Who can tell so well as the man that has been through the fire and lost money and still says that the man is an honest man?

The COURT: In the first place, the question present- to the court is not what his conduct was in any particular instance mentioned.

Judge MORAN: I don't ask him any instance.

The COURT: Not what any particular instance may have been. You cannot call depositors in Mr. Dreyer's bank or the men,
542 if any, who lost money by him and let them testify what his conduct in any particular instance was.

Judge MORAN: I don't ask for that.

The COURT: You ask this witness what his relations were.

Judge MORAN: I ask him if he had business dealings and lost money. I don't want to know how much nor whether he paid him.

The COURT: That would be upon the theory that he could testify to an individual transaction.

Judge MORAN: No, sir; I don't ask any individual transaction. I show the relation of this man to him. I don't ask him whether in his matter he was honest or dishonest or in the history of his whole matter, but I show that he had money in his bank and lost it when he failed, and I now offer this man to prove his general character for honesty.

The COURT: Objection sustained.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Judge MORAN:

(Q.) Do you know his general reputation for honesty and fair dealing?

A. Yes, sir; I do.

Q. What is it, good or bad?

A. Up to his trouble, the trouble of his bank, it was good.

Q. And since?

A. Well, since—some believe one thing and some a certain other thing. Since that time I have heard men say they still believe he is honest.

Q. Do you still believe it?

543 Which question was objected to by counsel for the People; which objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Cross-examination by Mr. BARNES:

Q. You heard his general reputation was good up to December 19, '96?

A. Yes, sir; up to the time of his failure.

Q. But after that time you have heard it questioned, have you not?

A. Yes, sir; some men blame him and some men think he was all right.

Q. You are a lawyer?

A. Yes, sir.

Q. You practice law in the city of Chicago?

A. Yes, sir.

Q. Have you put on any character witnesses in any case you tried?

Which question was objected to by counsel for the defendant; which objection was sustained by the court.

Q. Now, answer this question: Do you know what his general reputation in the community is? Do you know? Yes or no.

A. I think I do; yes, sir.

Q. Now, do you know what his general reputation in the community was for honesty and fair business dealing from December 19, '96, up to January 1st, '99?

A. That is, since his failure?

544 Q. Yes, sir.

A. Yes, sir.

Q. What is it up to that time?

A. His reputation has suffered since that time. It is not so good.

MICHAEL BRENNAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Judge MORAN:

Q. Give your name in full.
A. Michael Brennan.
Q. Where do you live, Mr. Brennan?
A. 365 Dayton street, in this city.
Q. Have you held any official position in the city?
A. Yes, sir.
Q. What?
A. Well, I have been connected with the police department. I have been chief of police here.
Q. For how long?
A. For about two years.
Q. Do you know Dreyer, the defendant?
A. I do.
Q. Do you know what his general reputation for honesty and integrity was up to December 19, '96, up to the time of the failure of the bank?
A. It was good.
Q. Well, you know what it was, do you?
A. Yes, sir.
Q. It was good?
A. Yes, sir.
Q. Did you have business dealings with him?
A. I did.
545 Q. Did you have money in the bank when it failed?

Which question was objected to by counsel for the People; which objection was sustained by the court; to which ruling the defendant, by his counsel, duly excepted.

Q. Did you lose money in his bank?

Which question was objected to by counsel for the People; which objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

(Cross-examination waived.)

546 E. S. DREYER, the defendant herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination by Mr. MORAN:

Q. Your name is E. S. Dreyer?
A. Yes, sir.
Q. You are the defendant in this case?
A. Yes, sir.
Q. How long have you lived in Chicago?
A. Thirty-five years.
Q. What business have you been conducting in Chicago?

A. When I came here—I learned in Europe the upholstering trade——

Q. A little louder.

A. When I came here—first I learned in Europe the upholstery trade and carriage trade. I worked at that business for about nine or ten months. Up to that time I had saved enough money to go to business college here. I went there fourteen months, or rather ten months first, and then I went into the real-estate business with Nohr Brothers, part of the time, and part of the time I attended school. So in all I attended school fourteen months. During the last four months I was partner in the real-estate business, and after the fourteen months business college course I went and took a clerkship in the same real-estate office, and three years afterwards I became a partner in the real-estate business of Nohr Brothers,
547 Kinzie and Clark street-. Then I stayed with them till the great fire, and I saw that we couldn't make a living together in that business, so I started on February 1st, 1871, for myself a real-estate office at 72 Dearborn street, and have remained in that business ever since, till afterwards, five or six or seven years afterwards, I started the banking business.

Q. Who with?

A. With Edward Koch, who had become a partner of mine; he has died since.

Q. How long did that continue?

A. Up to 1891.

Q. Well, then, was there any change?

A. About seventeen years before 1896 I took another partner, Mr. Robert Berger, the one present here, and in 1891 Mr. Edward Koch stepped out and Mr. Robert Berger and myself continued partnership — the banking business, real estate, and mortgages up to the time we were forced to close by the failure of the National Bank of Illinois.

Mr. BARNES: I object, and move to strike out that answer, his drawing conclusions, forced to fail, he says, by the National Bank of Illinois. Whether he was forced to fail or not by the National Bank of Illinois must be deductions from facts. I move to strike out the answer as not responsive.

The COURT: Well, that portion of the answer.

Mr. MORAN: I object to its being stricken out and save a point on it.

548 To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. Mr. Dreyer, have you held any official positions in the city of Chicago?

A. Yes, sir; several.

Q. What?

A. I was eight years a member of the board of public library and for two years its president. I was a member of the Chicago real-estate board, and was one year its president. I was under three

commissioners who were appointed by Mayor Washburne to recommend the elevation of our tracks here, which at the present are all elevated, and was a member of a county school board. I was elected a member of the city school board; but I resigned because I had too much to do.

Q. Were any salaries attached to any of these offices?

Objected to by counsel for the prosecution. Objection sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. Mr. Dreyer, you heard the testimony of Mr. Blount on the stand the other day?

A. Yes, sir.

Q. With reference to service of a demand on you and a conversation in the hall of the criminal-court building somewhere?

A. Yes, sir.

Q. Do you remember the date?

A. I can't say the date. It was the end of January, last year, 1899, I think.

Q. State what he said to you and what you said to him on
549 that occasion.

A. Mr. Blount met me in the hall—I believe it was on this floor—and said that he had to make a demand for the money I owed to the West park board.

Q. What did you say?

A. I told him what that meant. I was out of supplies. I said, "What do you mean by this, as long as you know that the West park has obtained a judgment in the United States court against the receiver of the National Bank of Illinois for the full amount of money due them, and the money is set aside for that purpose?" He said, "I know that, and you personally have my sympathy, but I am acting under directions and have to make this demand upon you." I told him then that I would see my attorneys and let him know within a few days.

Q. Was that the end of the conversation?

A. Yes, sir.

Q. Mr. Dreyer, do you recollect the date of your first election as West park treasurer, treasurer of the West park board, and by that I mean West park commissioners?

A. I do not. I think it was, to the best of my recollection, in April, 1894.

Q. State whether or not you were here when you were elected.

Objected to by counsel for the prosecution as immaterial where he was.

Mr. MORAN: I do not think so, your honor. I think all the circumstances surrounding this defendant's election and action as director are competent proof.

550 The COURT: Whether he was here or not when elected?

Mr. MORAN: I may ask him?

The COURT: Yes.

A. I was here that day on the election. I came here the day before election from Omaha, where I had been on a business trip.

Q. State whether or not you sought the office.

Objected to by counsel for the prosecution.

Mr. BARNES: It is a question whether he accepted the office, not whether he sought it.

Mr. MORAN: Does your honor rule it out?

The COURT: Certainly.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. You acted as treasurer of the West park board?

A. Yes, sir.

Q. Did you have any conversation with the members of the West park board as to how you should manage your office?

Mr. BARNES: I object. It is immaterial if he did. The West park board is a corporation, and——

The COURT: He may answer. I don't see that that is any consequence.

Mr. MORAN: Suppose a member of the board told him, as was a fact, that he had to pay interest on his money; isn't that competent?

The COURT: No; I don't think it is at all. Suppose
551 another member told him he had not.

Mr. MORAN: That would be competent, too, your honor. The question here is whether anything that happened in this case happened through this man's felonious intent. All the circumstances should go to this jury to see whether or not a crime has been committed—all the circumstances of his connection with that money, from beginning to end.

The COURT: Everything that is pertinent to the case on trial should go to the jury.

Mr. MORAN: Everything he did is pertinent.

The COURT: Whatever conversations he may have had with members of the park board, I can't see——

(Question read.)

Objection sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. Who was pres-ent of the West park board at that time?

Mr. BARNES: Which time?

Mr. MORAN: At the time he went in as treasurer.

A. Mr. Moll.

Q. Mr. Moll?

A. Carl Moll.

Q. What other position did Mr. Moll hold—any business position?

Objected to by counsel for the prosecution as immaterial.
552 The COURT: I don't see any special objection to that.

A. He was cashier of the National Bank of Illinois.

Mr. MORAN:

Q. You filed a bond that was in evidence here the other day?
A. Yes, sir.
Q. On that bond appeared the name of Schneider?
A. George Schneider, the president.
Q. Who was he?
A. President of the National Bank of Illinois; also the name of George Weiss.
Q. Who was Gerige Weiss?
A. He was president of the American Brewing Company.
Q. What relation did he sustain to Schneider?

Objected to by counsel for the prosecution as immaterial.
The COURT: I don't see what that has to do with the case.
Mr. MORAN: I want to show, your honor, that Schneider and Weiss, who went on this bond—Schneider was the president of the National Bank of Illinois and George Weiss was his son-in-law.
The COURT: I don't see what that would have to do with the case.
Mr. MORAN: Well, I offer to show that.
Objection sustained by the court and offer denied; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. Mr. Dreyer, where did you open your account for the West park board, or did you open an account for the West park board?
A. Yes, sir.
553 Q. Where?
A. With the National Bank of Illinois.
Q. How long did that account continue?
A. About eight months.
Q. After that account ceased, in what way was the West park money kept by you?
A. It was merged with the account of E. S. Dreyer & Company.
Q. Where was that account kept?
A. In the National Bank of Illinois.
Q. Did you have any agreement or contract with the National Bank of Illinois with reference to paying your checks?
A. Yes, sir.

Mr. BARNES: Wait a moment. I object and move to strike out the answer.
The COURT: Objection sustained.
Mr. BARNES: I move to strike out the answer.
Mr. MORAN: Wait a moment. Don't let us go too fast.
Mr. BARNES: I said wait a minute, and the witness answered the moment the question was through.

Mr. MORAN: The question was whether he had a contract. I want to ask him then what that contract was. I first want to know whether there was such a contract. The question of whether the contract can be proved isn't the question.

The COURT: I take it, of course, that you mean some contract other than the contract which the law implies.

Mr. MORAN: I want to show a contract not of that kind. I don't want to characterize it now. First, I want the answer to
554 stand. Do I understand your honor to strike it out? The answer "Yes" stands and then I will get to the other questions. That raises the question, and when we get to that we will see whether I have the right to prove the contract, if it existed.

Mr. BARNES: It doesn't appear that there was a contract, and that it is material to ask whether there was one.

The COURT: You really mean in your question whether he had a contract other than that which the law implies from the deposit of money in a bank.

Mr. MORAN: Not necessarily, your honor.

The COURT: Then the answer may stand. Simply ask if he had a contract.

Mr. MORAN: Yes, sir. Now, I ask what was that contract?

Mr. BARNES: That I object to.

Mr. MORAN: Now, I will disclose what I want to prove.

Mr. BARNES: You want it to appear that was a parole contract?

Mr. MORAN: That contract was not in writing, Mr. Dreyer?

A. No, sir.

Mr. MORAN: Now, your honor, I want to prove this: I have already proved—I want to make the statement so as to keep it connected—that that was Dreyer & Company—E. S. Dreyer & Company kept their bank account with the National Bank of Illinois; that from time to time during the course of business, lasting
555 through seventeen years and down to the time of this failure, Dreyer's bank account was overdrawn with the National Bank of Illinois; that to secure the National Bank of Illinois Dreyer & Company deposited with that bank collateral in the shape of personal securities, as well as the conveyance of a large amount of real estate to the bank; that that was upon the express agreement that the checks of Dreyer & Company should always be paid in that bank, and that when it came to the taking of the West Park Board account it was with the express understanding with Mr. Schneider and with Mr. Hammond, the vice-president and manager of the bank—vice-president—I don't know whether he was the manager or not—that with Dreyer having that security in their hands and having that account deposited with -em, they would pay every check drawn on that fund. I propose to prove in connection with that prior to this West Park Board account that this bank, in pursuance of that contract, advanced to Dreyer & Company, after the failure of Barring & Brothers, a million of dollars, paid their checks to the extent of a million of dollars over and above their account, and that, as has already appeared at different times after the West Park Board account went in there, Dreyer & Company's

account was overdrawn; that th-y then, under this agreement, paid every check and draft of the West park board down to the time that this bank was taken out of their hands by the United States authorities; that, relying upon that agreement and act-
556 ing under it and its being carried on every day, Dreyer continued his account in that bank, putting in the West park moneys with everything else; that the West park checks went there, and, as we have seen, they were paid through that bank, went into the coffers of that bank; were drawn against by Dreyer to pay West park affairs and were drawn against, in all probability, to pay other debts of E. S. Dreyer & Company, but that the National Bank of Illinois continued to perform the contract for which they had Dreyer's security down to the day that the possession was taken, and everything in that bank was taken out of their hands. Now, that is the contract I expect to prove, your honor, and I expect to prove it in this case. Here is a man who had seventeen years' business with this bank; here is the son-in-law of the president of the bank, his partner, Mr. Berger; here is the president of the bank and the vice-president of the bank making this contract with them; it is carried on for seventeen years; the checks are paid of Dreyer & Company because the collateral was there in the bank; the bank felt safe to pay them. Now, I say, your honor, the difference between that and putting it in a bank account—what is that? That is book-keeping; that is all. Supposing it was in the shape of a bank account on the faith of that collateral, and that they have credited it up on their books in the bank account and that bank closed down, as it did close down, with that money in it on the bank account, it not really being there, but his having the credit
557 for it there upon the books, if your honor please, could he have got it any more than he could have got it after the bank closed down and they could no longer keep their contract with him to pay those checks. What is the difference, morally speaking; what is the difference in legal essence, if your honor please? What is a bank account? Why, it is a contract to pay a man's checks, isn't it? It isn't his money in the bank. The money becomes the money of the bank when it is deposited to an account, and it is only a contract that drafts on that account will be honored. That is all. I suppose I need not cite to your honor authority upon that position. I cited them before in this Dreyer case to your honor; that the deposit to an account made it the property of the banker, and that *is* an undertaking to pay checks is but a contract. Now, I say, here is a man with a contract with a bank, and security up in that bank by which that bank says to him, "All your checks—we know your condition—here is your security; all your checks will be paid," and when that, your honor, is shown to be the truth by a course of business running through seventeen years, growing business running through seventeen years—nay, I will show it to be the case, after the panic of 1893 set in, when things began to schrivvel up in this city; when securities under the pressure of that panic began to be questionable; when every man's property, from being large and valuable, shrunk up into nothingness; from 1893, a year before

Dreyer was elected treasurer, through the hard panic
558 times of 1894, 1895, and down to 1896, when the crash came of that bank and of other banks, every check of the West park board was paid by the National Bank of Illinois under this contract. That I offer to prove. Now, isn't that competent evidence in a case where a man is charged with a felony, charged with the use of the money of the West park board with a felonious intent, charged with the use of the money, charged with the embezzling of the money of the West park board; if your honor please, isn't that a circumstance that addresses itself to the human mind on the question of whether he is guilty of a felony or not? At the utmost that could be said he was disappointed. He relied too long upon that contract. It was no longer business to put faith in them; but the circumstances show, your honor, that the faith was well founded. They didn't refuse to pay; they didn't refuse to honor these checks. The course of business which I have stated here would lead any prudent man, any honest man, to believe that the bank would go on paying this money of the West park board till the last dollar of it was restored or paid out for the uses of that board. It had been conducted, your honor, on that principle, and had caused the payment of $1,500,000—yes, near two millions of dollars of the West Park Board money had gone in that bank under that contract checked out. There is not a particle of evi-
559 dence here that a single check of the West park board was ever dishonored or ever refused; that it wasn't promptly paid up to that fatal 19th day of December, when the Bank of Illinois was seized by the superior power of the Government officers. Now, I say, your honor, that these are circumstances to go to this jury on the question of whether this was accidentally lost or not. Was it accident that it was lost? Suppose he had loaned it to the bank and they failed to pay under the conditions that we see here. Would it be not accident, your honor, that they were closed down, taken possession of by the Government authorities, with upwards of three millions of ready cash in their vaults? Now, that is the contract that I expect to prove by this witness, your honor; a contract under which he proceeded to do business for seventeen years; a contract repeatedly renewed; additional security put up with the National Bank of Illinois, and specially renewed with reference *with* the West board. I propose to follow that up, your honor, with the statement showing the intention to carry on this contract by Mr. Dreyer to Mr. Hammond and to Mr. Schneider; that his term of office as West park commissioner, West park treasurer, was about to expire, and that in a short time, a month or six weeks, the whole amount of money of the West park board would have to be turned over by him, and the assurance to him that it would be turned
560 over *over* every dollar of it would be paid, and they went to work to make provision for the payment of it, your honor, when they were overtaken by this condition of things. Now, that is the contract that I expect to prove by Mr. Dreyer. That is an honest contract. If something steps in to prevent this being done, to prevent the carrying out of that contract, that same thing, your honor,

prevented the carrying out of every contract with that bank with any of its depositors. No man who had an account on the books of that bank could any more touch a dollar of that money after that bank failed than Dreyer could get his check honored by that bank. No institution, no matter what its contract was or what its account was or how its account stood on the books of that bank, could get a dollar out of it after the Government had seized it, except to go about it in the same way that the West park board did—present their claim to the receiver, and if it wasn't allowed by him sue for it in court and get a judgment and get the money in that way. Now, your honor, if some technical legal distinction exists about book-keeping is a man to be sent to the penitentiary upon it? I ask your honor if you have agreed with me to do a thing and you have carried on your agreement for fifteen years, and that agreement involves your paying what I undertake, and I, in good faith, go on on that agreement and you are killed, an act of God interferes or the
561 act of the Government interferes, and I can't meet my obligations to men I am under obligations to, am I dishonest, a dishonest man by reason of that? Am I a criminal by reason of that? I may be unfortunate, I may be imprudent, but the man who denounces such facts as that as constituting a criminal loses the distinction between misfortune and crime. Now, your honor, I offer this evidence in good faith to go to this jury to show the relations and deeds of this man with this money for the purpose of showing that he acted in good faith; that he handled it in good faith; that he paid interest upon it while he had it, every dollar of it, as has already appeared, and, your honor, that he met the obligations of the West park board and had them paid to the last cent until the Government took possession of that bank by its strong power and has held it till this day. Isn't that competent? That is the contract I offer to prove and the course of business I offer to prove.

The COURT: This isn't a question of book-keeping, and the defendant cannot be convicted of any offence because of some method of book-keeping. The question primarily is whether he did pay over to the West park board its money which he had received when he was called upon to do so. It is proposed now by this evidence, not to meet that question, but to say, No; he didn't pay it
562 over, because he didn't have the money and had not any security for the money; but, on the contrary, had himself given securities in *other* that he might overdraw his account, as the evidence is, to some millions of dollars. If this man, as I said before, and say now—if it appears here that he had this money, three hundred thousand dollars, in the National Bank of Illinois, then I would instruct the jury to find him not guilty, because in that case I would say that his inability to get the money was due to misfortune or accident; but it isn't proposed to show that. It is proposed to show merely that instead of keeping the money of the West park board, as he had a right to, either in his own personal possession or in the possession of E. S. Dreyer & Company or in the possession of the National Bank of Illinois, he had drawn every dollar of that money out and he had given some securities in order that he might

make a great overdraft upon the bank. It isn't a question of bookkeeping at all. There is no way——

Mr. MORAN: It is a question of their contracting to pay his drafts.

The COURT: That is to say, it is proposed to show that a man having money in his hands, in trust, may put it out of his hands and then say he isn't responsible for it, because, while he hasn't it on deposit at all—hasn't it on deposit—has drawn it all out and
563 used for his own purposes, because some man has agreed to make him advances—that is what you propose to show.

Mr. MORAN: No, your honor.

The COURT: You say the National Bank of Illinois agreed to make advances to this man.

Mr. MORAN: Yes, your honor. I haven't pretended he isn't responsible for it. He is responsible for it, and his bondsmen are responsible *a* for it.

The COURT: Of course; undoubtedly.

Mr. MORAN: The question is whether he has been guilty of a crime under that condition of things.

The COURT: You mean the pecuniary responsibility; I understand that perfectly. You say that that is the defense to this case; that he had not a dollar of this money, either in his own possession or in the possession of E. S. Dreyer & Company or in the possession of the National Bank of Illinois, but that he had the promise of the National Bank of Illinois that it would honor his checks.

Mr. MORAN: They had made provision to do it and had had security to do it.

The COURT: Yes; and he had given some security that they would loan him still further money.

Mr. MORAN: Yes, sir; advance and pay all the checks.

564 The COURT: It so happened, as I stated before, the National Bank of Illinois was supposed to be in good standing and credit by the people. I will say by the people; I suppose by the people, but people who didn't know them.

Mr. MORAN: It was in good standing, your honor.

The COURT: It was in good standing, in credit by the community in general; but I can't see how it makes any difference, when he didn't have any money there, whether their undertaking, legally speaking, so far as this case is concerned, was on the part of the National Bank of Illinois or on the part of John Doe or Richard Rowe or any other man in the town.

Mr. MORAN: Let me suggest, your honor, suppose he had national bonds in pledge in the bank upon a contract that they would pay the checks and overdrafts that he made.

The COURT: I don't think it would have made any difference whatever. The money was the thing he didn't have. He had no money on deposit there.

Mr. MORAN: I know, but he——

The COURT: He had no money on deposit there anywhere.

Mr. MORAN: It didn't make any difference whether he had no money on deposit anywhere, as far as the account was concerned

on the actual fact of having money was concerned. The question is whether he had such arrangements made as, being acted
565 upon, the drafts of the West park board were paid and had been paid, as I said, to the extent of nearly two million dollars, and would continue to be paid had the Government not seized the bank. That is the point.

The COURT: That is to say, that he had the undertaking of the bank that they would advance him still more.

Mr. MORAN: Yes, sir; and that they had acted upon it and paid it, and that every dollar of this would be paid by that bank, and Dreyer would remain simply indebted to that bank if his collateral didn't support it, if it wasn't for an accident coming out of a clear sky, the seizing of that bank and its funds. Now, look, your honor: Schneider was *oapn* the bond of Dreyer. Every circumstance that could address itself to an ordinarily prudent man led Dreyer to rely upon the undertaking of that bank to pay his drafts. Now, your honor, you say defense—the matter is this: It is to go to this jury, as I insist it should, has his business conduct with reference to this fund—all the circumstances here are to go to the jury, because if this man is criminal, it is made up of all the circumstances in this case.

The COURT: My idea of it is, in the very inception of things, that a public official holding public moneys should, instead of keeping them on hand, take somebody's promise that they will advance money to him when he wants it; isn't what the law will
566 sanction, and that that isn't any defense whatever.

Mr. MORAN: Well, your honor rules it out?

The COURT: Certainly.

Mr. MORAN: Well, I save an exception to that, and also an exception to the statement of the court.

Objection sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. When the West park board commenced to turn over their funds, where did they turn them over?

A. The most part of it to the Chicago national bank.

Q. After that when they came where were they placed?

—. Do you mean when they turned them in——

Q. To you or to anybody.

A. To E. S. Dreyer & Company.

Q. Did you mean that they were turned in at first to the Illinois national bank? You didn't mean the Chicago national bank, did you? You said the Chicago national bank a minute ago. Did you mean that or did you misstate the name?

A. The Chicago national bank. The money was first turned over to me by the Chicago National Bank officials.

Q. When Blount was cashier?

A. When Blount was treasurer.

Q. He was also cashier of the bank?

A. Yes, sir.

The COURT: That is, cashier, you mean, of the Chicago
567 national bank?
A. Of the Chicago national bank.

Mr. MORAN:

Q. State the course of business between you and the West park board and you and the National Bank of Illinois with reference to those funds.

Mr. BARNES: I don't know, Judge. You have a pretty broad question there.

Mr. MORAN: The course of business. You insisted upon it the other day.

The COURT: I suppose you mean the manner in which he received the funds?

Mr. MORAN: Yes; and paid them out.

The COURT: Well, he may state it.

Mr. BARNES: There is no objection to that; that is all right.

(Witness withdrawn.)

JOSEPH STOCKTON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. MORAN:

Q. Give your name in full.

A. Joseph Stockton.

Q. How long have you lived in the city, Mr. Stockton?

A. Forty-eight years.

568 Q. What is your business?

A. Transportation.

Q. Do you know E. S. Dreyer?

A. Yes, sir.

Q. How long have you known him?

A. Twenty to twenty-five years.

Q. Do you know his general reputation or general character for honesty and integrity among people who dealt with him and know him?

Objected to by counsel for the prosecution.

The COURT: What is the objection?

Mr. BARNES: Leave out character.

The COURT: General reputation for honesty and integrity among people who knew him and dealt with him?

A. Yes, sir.

Mr. MORAN: What was it, good or bad?

A. Good.

Cross-examination by Mr. BARNES:

Q. Did you know it after December 19th, 1896, and up to the time, January 1st, 1899, his general reputation in the community; what people generally said about him?

A. Not except what I saw in the papers.
Q. Then you didn't know anything during that period?
A. Yes, sir.
Q. Was it good or bad, his general reputation?
569 A. His general reputation among his friends was good.
Q. No; general reputation, not amongst his friends, general reputation in the community?
Mr. MORAN: General reputation among people he dealt with and who knew him.
Mr. BARNES: No; general reputation in the community, in the neighborhood in which he lives, and that includes in the city of Chicago, the entire city of Chicago.
Mr. MORAN: Well, answer, General.
A. Good.

Mr. BARNES:

Q. You never heard his reputation questioned during that period?
A. Yes, sir.
Q. Generally?
A. Not generally, because I did not discuss it much.
Q. But you did hear it when it was discussed?
A. Yes, sir.

E. S. DREYER, recalled, testified as follows:

Mr. MORAN:

Q. The last question I asked you was to state the course of business between the West park board and you as treasurer and between you and the National Bank of Illinois with reference to the funds of the West park board.

Mr. BARNES: Well, I object to the question. It isn't a question what was the course of business between him and the National
570 Bank of Illinois and the West Park Board funds. The material question is the course of business between him and the West park board with regard to these funds.
The COURT: I think he may state in what manner he received the moneys of the West park board, the manner, place, and time, and he may also state what he did with the funds.
Mr. MORAN: Yes, and how they were paid out.
The COURT: And how they were paid out.

Mr. MORAN: Go on, Mr. Dreyer.
A. When I received the money of the treasurer, Blount, I believe it was $249,000, to the best of my recollection. I went over to the National Bank of Illinois and opened an account there for the West park commissioners with the National Bank of Illinois, and it was understood that——

Mr. BARNES: I object to what was understood.
The COURT: Don't state what was understood. What did you do in regard to depositing the moneys or in regard to receiving them or in regard to paying them out?

Mr. MORAN:

Q. What did they tell you in reference to that?

Mr. BARNES: That I object to.

The COURT: Did who tell him?

Mr. MORAN: The National Bank of Illinois.

Mr. BARNES: I object. It is only offered to get in in another way what has been excluded.

Objection sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

571 Mr. MORAN:

Q. What did you do, now?

A. I deposited the money there, and when vouchers came and the West park board opened an account with E. S. Dreyer afterwards, and when the vouchers came in they were paid through the National Bank of Illinois still, I merged the account afterwards with the account of E. S. Dreyer & Company at the request of the officers of the National Bank of Illinois.

Objected to by counsel for the prosecution.

The COURT: Now, what is the materiality of that, the request?

Mr. MORAN: To show that he was doing it under the direction of the National Bank of Illinois, where he was depositing.

The COURT: That doesn't make any difference. Certainly they requested him so to do. The request wouldn't make any difference in this case, nor have any tendency to.

Mr. MORAN: I think not, your honor.

The COURT: It would not make him innocent in the case. The fact that he did it may be shown, but whether it was requested by himself or the National Bank of Illinois I don't see that it makes any difference.

572 Mr. MORAN: This is the difference: Quite true, your honor, that the request would not make him guilty, but it is not, in my conception of this case, true that the request would not show an innocent object on his part. Is it criminal to do it? Here is a bank, as I said before, that is undertaking his account and is paying it out without reference to whether his account is credited with that amount or not, gives him a direction. Where that bank is surety on his bond by its officers is it criminal——

The COURT: No; it is not criminal.

Mr. MORAN: Very well, that is what I insist on.

The COURT: But whether the National Bank of Illinois requested it or not, the court holds it is immaterial, and sustains the objection.

Mr. MORAN: But this man is on trial for a crime. Everything that is said and done to him, every direction that is given to him about this, shows one way or the other. He could not be guilty of a crime here without felonious intent.

Mr. BARNES: Yes; he could now.

Mr. MORAN: Wait a minute. Now, you have alleged it in your indictment.

Mr. BARNES: Don't have to.

Mr. MORAN: But you have, and you will have to prove it before this jury.

Mr. BARNES: No; we won't.

573 Mr. MORAN: Now, I say the circumstance, your honor, of what he was directed to do, particularly where the president of the West park board was president of this bank—look at the condition of this thing now. He is put in this West park board. The president of the West park board is president of this Bank of Illinois. Schneider goes upon his bond. They direct this little man to pay this money, and he does it and in good faith, does it with no feeling of crime or wrong or of applying anybody's money wrongfully at all. He does it, and when we offer to prove it you say, "No;" that does not affect it.

The COURT: I have heard you on this three times. I have tried to decide it. You seem to impute to the court the idea that the court thinks there was some guilt in his transferring it. I say again there is not, and the objection is sustained.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN: The question I asked him was how he came to transfer it. At the request of the National Bank of Illinois?

The COURT: Whether it was at its request or not, I hold it is immaterial.

Mr. BARNES: That is stricken out.

The COURT: That part is stricken out.

Mr. BARNES: "At their request," I understand, is stricken
574 out, but that it is merged——

The COURT: That is stricken out.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. How was it paid out of the National Bank of Illinois?

A. By check of E. S. Dreyer & Company. First the vouchers came in from the West park board to E. S. Dreyer & Company, and they gave their check on the National Bank of Illinois.

Q. Was that the course of business all the way through?

A. Yes, sir.

Q. Were these drafts of E. S. Dreyer & Company paid by the Bank of Illinois at times when the account of E. S. Dreyer & Company was overdrawn in the National Bank of Illinois?

A. Yes, sir.

Q. Always?

A. Always.

Q. How did that come?

Mr. BARNES: Wait a minute; that I object to.

Mr. MORAN:

Q. Under what arrangement was that done?

Mr. BARNES: That I object to.

Which objection was sustained by the court.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN: Did that continue?

A. Yes, sir.

575 Q. For how long?

A. Until the National Bank of Illinois closed its doors.

Q. For how many years?

A. Three years and two months.

Q. Speak a little louder.

A. Three years and two months since——

Q. Well, when did it end—that course of business?

A. The 19th of December, 1896.

Q. What occurred on that day?

A. The National Bank of Illinois closed its doors.

Q. What else occurred?

A. We failed, and several other banks.

Q. All on that day?

A. All on that day.

Q. Now, for how many years had the National Bank of Illinois paid the checks of E. S. Dreyer & Company—whether E. S. Dreyer & Company was overdrawn or not?

A. Seventeen years.

Mr. BARNES: That I object to. Wait a minute, Mr. Dreyer; I suppose I should object to it.

The COURT: I do not see how it should have any materiality.

Mr. MORAN: Seventeen years, he says; it was the course of business.

Mr. BARNES: Well, I had objected to the question, Judge, or I ought to object.

The COURT: I don't see how it would be material in itself. I think the three years and two months you spoke of——

576 Mr. MORAN: Your honor, isn't it in this way? The three years and two months——

The COURT: The time he had been treasurer.

Mr. MORAN: Yes; now, he relied upon them to pay and they did pay down to this day. Now, that reliance grew out of a course of business in which they had paid his checks, overdrafts, to the extent of a million dollars before that; that was the source of his confidence; it was on his confidence in the payment of his checks. Now, isn't that material? Didn't that go to convince this man, or any man of prudence, that he could do a thing like that?

The COURT: The impression in my mind is not that. The question is not upon his reliance, but upon the condition of the bank. Now, the fact that I allowed the testimony as to three years and two

months to stand was as it was the time when his accounts were kept there. The fourteen years prior to that, I think, is immaterial.

Mr. MORAN: Well, isn't it material as to being the foundation of his confidence?

The COURT: I don't think his confidence has anything to do with the matter.

Mr. MORAN: His honest belief and confidence has nothing to do with it?

The COURT: His honest belief and confidence that they would continue to loan him money I do not think is of any
577 consequence.

Mr. MORAN: Well, I except to the ruling, and also the language in which the ruling is made.

Mr. BARNES: I move that the evidence then—there is an answer there how long it continued—be stricken out, and I have no objection to its appearing, what was done about the overdrawn account during the period of this account which is in evidence—that is, from April, 1894, which is little more than three years.

The COURT: Well, I don't understand the witness answered anything except the three years and two months.

The WITNESS: I believe your honor is mistaken as to the three years and two months. I meant that the National Bank of Illinois closed three years and two months ago. I don't know where you got that.

The COURT: Oh, yes. Then we are misunderstanding you?

Mr. BARNES: We were mistaken.

Mr. MORAN: Let me ask you again this question, Mr. Dreyer:

Q. Will you state the course of business here from the time you first became West park treasurer down to the time that *the time* the National Bank of Illinois failed? Now, how long was that?

A. That wasn't quite three years. I believe I was elected April, 1894, and we failed on May 21st——

Mr. AUSTRIAN: December?

The WITNESS: December 21st, 1896.

578 Mr. MORAN:

Q. Well, December 21st. Saturday was the 19th?

A. Yes, sir.

Q. And Monday was the 21st?

A. Twenty-first.

Q. You did not open on the 21st?

A. We did not open on the 21st.

Q. Now, the National Bank of Illinois did not open on the 21st?

A. No.

Q. Do you know at what hour in the afternoon the receiver took possession of the National Bank of Illinois?

Mr. BARNES: That is immaterial, but——

The COURT: I think he may answer. It may be material.

Mr. BARNES: All right.

Mr. MORAN: Well, I will ask you this:

Q. When was it, before or after a receiver was appointed for your bank?

A. It was after. The receiver——

Q. Was the National Bank of Illinois closed before or after the receiver was appointed for your bank?

A. The National Bank of Illinois was closed before we had a receiver appointed.

Q. Did you, while you were banking—while your account was kept—the firm of E. S. Dreyer & Company—while the account was kept in the National Bank of Illinois, keep any considerable money on hand in E. S. Dreyer & Company—I mean in the banking office of E. S. Dreyer & Company?

A. No, sir; we did not have a burglar-proof vault, and
579 kept only a few thousand dollars over night, always.

Q. Mr. Dreyer, did you ever apply to your individual use any of the money of the West park board?

Mr. BARNES: That I—well——

A. Never one dollar.

Mr. MORAN:

Q. Since the failure, at the time of the failure of E. S. Dreyer & Company, did you take of that concern any of its funds or property—you individually?

A. No, sir.

Q. At the time of the failure, Mr. Dreyer, how much money did you, individually, have?

A. Thirty-two dollars.

Mr. BARNES: Wait a minute; wait a minute; I object.

The COURT: Oh, I think that was immaterial.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. Have you got any money or property now?

A. No, sir.

Mr. BARNES: That I object to. Wait a minute.

Mr. MORAN:

Q. How much——

The COURT: That is immaterial.

Mr. BARNES: I wish the witness would not answer when objections are made. If he answers, I wish the answers stricken out.

The COURT: Both of those answers may be stricken out.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

580 Mr. MORAN:

Q. Mr. Dreyer, did you and your wife give up immediately after

your failure all of your property of every kind and nature to your creditors?

Mr. BARNES: To that I object.

Which objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. MORAN:

Q. Didn't I ask you specifically whether you ever took or applied any of the money of the West park board to yourself individually?

Mr. BARNES: You did, Judge, and he answered that he did not.

A. Yes, sir.

Mr. MORAN:

Q. Have you got any of it now?

To which question the assistant State's attorney objected; which objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. Prior to the failure of the National Bank of Illinois were you ever charged with any crime whatsoever?

A. Never.

Cross-examination by Mr. BARNES:

581 Q. Mr. Dreyer, at the time when you became treasurer of the West park board your firm consisted of yourself and Mr. Berger, did it?

A. Yes, sir.

Q. Mr. Robert S. Berger?

A. No, sir.

Q. Robert Berger?

A. Robert Berger.

Q. And Mr. Robert Berger is the son-in-law of Mr. Schneider, who was the president of the National Bank of Illinois?

A. Yes, sir.

Q. And you were in partnership together?

A. Yes, sir.

Q. Was it a partnership or corporation—Edward S. Dreyer & Company?

A. Yes, sir.

Q. Were your interests equal?

A. Yes, sir.

Q. Your business was keeping a banking business and also banking business?

A. Yes, sir. The most—the largest part of our business was mortgages and real estate.

Q. Your office, in regard to real estate and mortgages, was conducted there in the bank building, was it?

A. Yes, sir.

Q. Were the moneys which you received from your partnership business deposited in your bank?

A. They were all deposited in the National Bank of Illinois.

Q. In the account of Edward S. Dreyer & Company?

A. Yes, sir.

Q. Were all the moneys which you used in your business put in that bank and checked out?

A. Yes, sir.

Q. And all the moneys of your depositors and customers, excepting what you kept in the bank of E. S. Dreyer & Company
582 for each day's business, were also put in the same account at the National Bank of Illinois?

A. Yes, sir.

Q. Do you remember that you had, when the National Bank of Illinois failed, $552 and some cents in that bank?

A. I don't know the amount. We owed them a large amount.

Q. Do you remember that you did not have a thousand dollars in the bank?

A. In the National Bank of Illinois?

Q. Yes.

A. No; not in that bank; no, sir.

Q. And that you did not have in your own bank six thousand dollars. Do you remember that?

A. Yes, sir.

Q. Now, did you have any cash—Edward S. Dreyer & Company, partners, have any cash anywhere else in this wide world?

A. No.

Q. Now, at that time you owed the West park board, as treasurer, did you not, $316,000.00, as treasurer?

A. Yes, sir.

Q. That money had been deposited in the National Bank of Illinois?

A. Yes, sir.

Q. Wasn't that money used in your business of Edward S. Dreyer & Company?

A. Yes, sir; it was paid out to reduce the indebtedness to the National Bank of Illinois.

Q. Well, that was to pay up moneys that you had borrowed from the National Bank of Illinois, was it?

583 A. Yes, sir.

Q. And you still owed, in addition to the $316,000.00 which you owed the West park board, as treasurer—you owed the National Bank of Illinois over $500,000 when you failed, did you not?

A. I don't know whether it was so much.

Q. Have you looked it up?

A. No; I have not.

Q. Do you remember that it was over $400,000?

A. Yes, sir; but they had security for it.

Q. But they didn't have any securities for the $316,000 that you owed the West park board, did they?

A. Yes, sir.

Q. Did you loan the money of the $316,000 to anybody?
A. No, sir.
Q. Didn't you undertake to pay interest on that money yourself—the firm of Edward S. Dreyer & Company?
A. Paid interest to the West park board as the law says.
Q. Yes; you paid the interest by entering it up on the books of Edward S. Dreyer & Company, on the daily balances, didn't you?
A. Regular business way.
Q. Now, you got one-quarter of that interest, didn't you?
A. Yes, sir.

Mr. MORAN: One-quarter of the interest credited?
Mr. BARNES: Not one-quarter of the interest credited, but one-quarter of two per cent., what the law says.

Q. And the three-quarters of the two per cent. you credited
584 to the West park board on the books?
A. Yes, sir; otherwise there wouldn't be that $16,000.
Q. Well, deducting that $16,000, or thereabouts, interest, there would be about $300,000 principal, wouldn't there?
A. Yes, sir.
Q. Now, Mr. Dreyer, what became of that principal?
A. It was merged in the account of E. S. Dreyer & Company and was paid to the National Bank of Illinois, to reduce our overdraft, and they——
Q. I want to know what was done with it. You paid it to the National Bank of Illinois, did you?
A. Yes, sir.
Q. And that reduced your indebtedness to the National Bank of Illinois, didn't it?
A. Yes, sir.
Q. Then, if you had not used the $316,000 to pay your debts to the National Bank of Illinois, instead of owing them four or five hundred thousand dollars you would owe them seven or eight hundred thousand, wouldn't you?
A. Yes; but we wouldn't have owed the National Bank of Illinois *Bank* that much. There would have been other arrangements made.
Q. I am not asking that. Therefore the money was used in attempting to pay the debts of E. S. Dreyer & Company, weren't they?
A. Yes, sir.
Q. Now, you had other depositors in your bank besides E. S. Dreyer & Company, didn't you?
585 A. Yes, sir.

The COURT: You don't mean other depositors besides E. S. Dreyer & Company?
Mr. BARNES: No; in the bank of E. S. Dreyer & Company.
The COURT: No; E. S. Dreyer & Company were not depositors in themselves.
Mr. BARNES: Oh, no. I will withdraw the question.

Q. You had other depositors, other accounts, in your bank of E. S. Dreyer & Company besides the West Park Board account?

A. Yes, sir.

Q. You treated all those accounts alike, didn't you, in so far as putting them in E. S. Dreyer & Company's account in the National Bank of Illinois was concerned, didn't you?

Mr. MORAN: I object.

The COURT: Well, the only way—I think he may show what entered into this account of E. S. Dreyer & Company with the National Bank of Illinois. I think we have had considerable evidence about it before.

Mr. BARNES: That was all testified to.

Mr. MORAN: It is not material, your honor, as to any other account.

Mr. BARNES: I will ask was the account of the West park board the only moneys that went into your account of E. S. Dreyer & Company in the National Bank of Illinois?

Mr. MORAN: I object.

The COURT: He may answer that question.

586 To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. No, sir.

Mr. MORAN: You can take and prove him guilty of some other offenses by that.

Mr. BARNES: Oh, no.

Q. Now, wasn't this the course of business between your bank and the National Bank of Illinois: that you took over to the National Bank of Illinois all of the checks, warrants, or drafts deposited in your bank to the account of any customers and they collected them through the clearing-house——

Mr. MORAN: I object.

Mr. BARNES:

Q. —and they would also, the same day, put out any checks that came through the clearing-house on your bank, and then they would deduct the difference, and you would send over a check at the end of the day, called a check for clearings, to settle up with them how much money they had paid out for you during the day; isn't that right?

Mr. MORAN: I object to that.

The COURT: I don't see, Judge Moran—I don't think we ought to go into this. There has been some testimony on this matter before, which was brought out by the State, but I don't think we ought to go into the way that other people's accounts, other people's deposits, were handled, any farther than it may appear—I think
587 it is proper for him to answer whether anything else entered into this account of E. S. Dreyer & Company with the Na-

tional Bank of Illinois, excepting the West park board. I don't think we better go any farther than that.

Mr. BARNES: It is all in evidence, anyway.

Mr. MORAN: It is in evidence on the part of the State. I confined my questions between the West park board and the National Bank of Illinois and E. S. Dreyer.

Mr. BARNES: Very well; I won't pursue the examination along that line. My attempt is to show that all deposits were treated alike.

The COURT: Well, I think the objection will be sustained.

Mr. BARNES: Now, Mr. Dreyer, when you opened your account, $249,000, or thereabouts, it was opened, I take it, with this check which has been introduced in evidence, and which has your signature down here, being State Exhibit "O"?

(Counsel hands witness exhibit.)

A. Yes, sir.

Mr. MORAN: What account are you asking about?
Mr. BARNES: When he started his account.
Mr. MORAN: Where?
Mr. BARNES: That is what I am going to find out.
Mr. MORAN: I thought you asked——
Mr. BARNES: Well, read the question, please.
(The last question and answer were read.)

588 Q. Now, Mr. Dreyer, have you looked at the account kept with the West park board in your books?

A. Not since the failure.

Q. Well, you were conversant with it—familiar with it—were you?

A. Yes, sir.

Q. Do you remember that it starts with this amount?

A. Yes, sir.

Q. Then it was entered up in that book, then, before it was taken over to the National Bank of Illinois?

A. Either the same day or the day after.

Q. Now, when you took it over to the National Bank of Illinois, did you take it out of this account?

A. Yes, sir. Now, I will not answer that question. Mr. Berger will be more able, because he run the banking business and I run the outside business. I don't know how the book was kept, except on general information.

Q. Well, I think if you look at the books, I think you will find you did. Now, when you deposited this amount over in the National Bank of Illinois you deposited to the account of whom?

A. The West park commissioners.

Q. Now, are you sure of that? Isn't it a fact—now, let me try and refresh your recollection—that you deposited this, in the first place, to the account of E. S. Dreyer & Company, and drew all but

$50,000 of it out, and put that to the account of E. S. Dreyer
589 treasurer, in the National Bank of Illinois?

A. No; I recollect now that I deposited—the check was deposited with E. S. Dreyer & Company, and then there was an account made for the West park commissioners, and everything was deposited on that account, except $50,000, which went to E. S. Dreyer & Company, to the best of my recollection.

Q. Did you look at the books here the other day and see that account kept in the name of E. S. Dreyer, treasurer?

A. I did not.

Mr. MORAN: I object. Mr. Dreyer has not been over the books and has not examined the account.

Mr. BARNES: Well, I don't suppose he pretends there were three accounts. I don't think he attempts to show there were three accounts.

Q. Were there three accounts over there?

A. No, sir.

Q. Then, if it appears in the books, E. S. Dreyer, treasurer—that is the other account, then, than the account of E. S. Dreyer & Company?

A. Yes, sir.

Q. There were two accounts?

A. Yes, sir; there were two accounts.

Q. Now, I notice in that account that it began April 14th, with $199,024, and that the account was closed out July 18th, 1895, a little over a year; that is the account you refer to, which at
590 that date was merged into the account of E. S. Dreyer & Company?

A. Yes, sir.

Q. Mr. Dreyer, did you deposit all of the moneys that you received as treasurer from the West park board in this account at this time?

A. Yes, sir; everything, except what we paid over direct, over the counter, in the bank of E. S. Dreyer & Company.

Q. Not what you paid out. I mean all that was received and credited to that account?

Mr. MORAN: He means that he paid out to the West park board, I suppose.

The WITNESS: Yes, sir.

Q. All that was credited to this account, I mean, your account as treasurer of the West park board, did you put it all, during that period of time, from April 14, 1894, up to July 18th, 1895, in that account known as the E. S. Dreyer—Edward S. Dreyer, treasurer—West park commissioners?

Mr. MORAN: Wait a minute. Do you mean to ask him how the account was kept?

Mr. BARNES: No. Whether all the moneys he received from the West park board were put in the account of E. S. Dreyer, treasurer, in that bank.

Mr. MORAN: That is how the account was kept. He did not

keep it, and was not asked anything about it. These books he had nothing to do with. What he did with the actual money that came to his hands, he can answer. In what account it was put on
591 the books he cannot answer.

The COURT: Yes; that is to say, what he did with the money, or what directions he gave as to how it should be kept or accounted; that is all right.

Mr. MORAN: Yes; that is competent.

The COURT: But what account was kept on the books—he did not act as book-keeper, but his books may be introduced.

Mr. BARNES (to defendant's counse-): What have you to say to that?

Mr. MORAN: Well, the court sustains the objection.

Mr. BARNES: Your honor sustains the objection?

The COURT: Yes.

Mr. BARNES:

Q. Did you give him directions as to the deposit of moneys you received as treasurer of the West park board?

A. I did not.

Q. Did you let it go just where it pleased?

A. No. When the vouchers came in from the West park board they showed where—whoever held the voucher got the money for it. There were no directions to be given about the payment.

Q. Now, isn't it a fact that you, Mr. Dreyer—that you drew moneys out of this account of Edward S. Dreyer, treasurer, during that period, to put into your own account because it was over-
592 drawn, and that you kept putting the moneys in to keep overdrafts in the National Bank of Illinois, in the account of Edward S. Dreyer, good, and that finally you put the whole business in there because you had spent all the money in your business of Edward S. Dreyer & Company?

Mr. MORAN: Well, in the first place, Edward S. Dreyer never had an account there—Edward S. Dreyer, treasurer, and E. S. Dreyer & Company.

The COURT: Yes; Edward S. Dreyer, treasurer, had an account, and E. S. Dreyer & Company.

Mr. MORAN: Now, he has asked him about his account of Edward S. Dreyer.

The COURT: If there is any question as to the account of E. S. Dreyer, solely, or E. S. Dreyer, treasurer——

Mr. BARNES: I will make the question all right.

(The last question was read by the request of the assistant State's attorney, and was amended by him by adding the words "& Company" after the name Edward S. Dreyer, where it appears in the question by itself.)

593 A. Yes, sir.

Q. Did you act as treasurer after December 21st, 1896?

A. No, sir.

Q. Now, from the time that you were acting as treasurer of the

West Chicago park board, when you were in your business, did you use the funds of your business, Edward S. Dreyer & Company, for your living expenses?

A. Yes, sir; a certain amount.

Q. And Mr. Berger did, too?

A. Yes, sir; we used whatever were the profits.

Q. How much were you indebted to the National Bank of Illinois when you became treasurer?

A. I cannot tell that now unless I see the books; it was a large amount.

Q. Wasn't it over $200,000?

A. I can't tell without the books; it may have been that amount.

Q. Isn't it the fact that your indebtedness to the National Bank of Illinois increased from that time on, generally speaking, each year up to the time of your failure?

A. Yes, sir; deposits were drawn and we carried a great deal of real estate that we paid money for.

Q. A great deal of this money that you used, that you had in the bank of Edward S. Dreyer & Company and in your account as such in the National Bank of Illinois, was used in the real-estate business, wasn't it?

A. Well, the deposits were drawn because we had banked
594 all the time, and the deposits ran down.

Q. But the moneys which you had in the bank and which you did not pay out on deposits were used in your business, weren't they?

A. Real estate and mortgages and notes.

Q. Real estate and mortgage business?

A. Bonds, and so on.

Q. That is where you lost your money, wasn't it?

A. We didn't lose it; we got it all.

Q. You have got it in cash?

A. No; we turned over about a million and a half to the receiver in real estate.

Q. What you think was a million and a half?

A. What it cost.

Q. What it cost?

A. Yes, sir.

Q. Away back when prices were high?

A. Yes, sir; ten years ago.

Q. Now, Mr. Dreyer, did you ever give a personal note to the West park board commissioners for this money?

Which question was objected to by counsel for the defendant.

The COURT: I don't see how that is material.

Mr. BARNES: Did Edward S. Dreyer & Company ever give a personal note to the West park board commissioners for the moneys of the West park board as shown to its credit on that firm's books?

595 Judge MORAN: What is the purpose of it?

The COURT: Do you object?

Judge MORAN: Yes, sir.
Which objection was sustained by the court.

Mr. BARNES: Did Edward S. Dreyer & Company ever give any securities to the West park board of commissioners for the money which you received as treasurer and which you say were put into that bank?
A. Yes; in the way of a bond.
Q. Just only your bond?
A. Official bond.
Q. You mean the bond you gave when you were treasurer?
A. Yes, sir.
Q. That is the only thing you ever gave as security?
A. That was considered good by the commissioners.
Q. Did you ever receive any collateral or security from the National Bank of Illinois for any of the West Park Board funds?

Which question was objected to by counsel for the defendant; which objection was sustained by the court.

Q. Did you ever loan the funds of the West park board out to any one while you were treasurer other than as they may have been considered a loan when put into your own account of Edward S. Dreyer & Company?
A. According to the agreement I did. I loaned it to the National Bank of Illinois.
Q. Answer the question, yes or no. Did you ever make a
596 loan of them?
A. I don't understand the question right—made a great many loans.
Q. Did you ever loan it out at interest?
A. At interest?
Q Yes; the West park funds out at interest?
A. We made a great many loans to merchants.
Q. You didn't loan any money out as the West park funds to anybody?
A. No.
Q. You didn't collect any interest from anybody for them, did you?
A. Oh, yes; I did.
Q. Who from?
A. From the National Bank of Illinois.
Q. For the account of the West park board?
A. Yes, sir.
Judge MORAN: Certainly.
Mr. BARNES: How did you collect it?
A. They paid me every month while they had the account two per cent. interest.
Q. That was only——
A. While the account was there.
Q. And that was only from April 14th, 1894, up to July 18th, 1895?

A. Yes, sir.

Q. From that time on you never received any interest from anybody, did you?

A. From E. S. Dreyer & Company.

Q. Did E. S. Dreyer & Company give any note or collateral for the funds he had?

597 Which question was objected to by counsel for the defendant; which objection was sustained by the court.

Mr. BARNES: My point is here. Perhaps your honor did not see the point that I wished to make. The law that was in force at that time required the defendant to place these funds in a responsible depository that would pay at least 2 per cent. interest on the daily balances, and held him as such treasurer accountable for that two per cent. Now, it would become a question of law and did before as to what he may have done with the moneys. He could not have put them in an irresponsible depository. He couldn't say, "Well here, I will call a pawn shop a depository and I will put them over there," and take their chances of paying him; in other words, he might as well have dumped them into the lake. Now, if he undertook to carry out the law by depositing these funds in a responsible depository, which he was obliged to do, and he is on trial here now for these funds, I think it is a pertinent question to ask him what he did towards collecting interest on those funds, whether he ever did anything else than to loan those funds in form as drawn out to his own firm. Now, I think it is a pertinent question to ask whether it was his own firm. He puts it into his own firm's books and they pay interest on it. Now, I think it is a pertinent question as to his due diligence and caution he ought to take as to whether he endeavored to get any collaterals or securities from his own bank for those funds. That is a pertinent question.

598 The COURT: I think not—not in this case. I am thoroughly satisfied that the objection should be sustained. We are not concerned with the matter of interest or due diligence.

Judge MORAN: We are concerned with the matter of interest because counsel has not stated the law as it is. If he did not put this money out he was obliged to pay interest on it.

The COURT: We are not discussing that. I have sustained your objection.

Mr. BARNES: Mr. Dreyer, at the time that the demand that Mr. Blount testified to was presented to you by him there were a number of people present, were there not?

A. Yes, sir.

Q. Did you see stenographers present?

A. I didn't know any of them. I thought they were all reporters. I don't recollect.

Q. Isn't it a fact that this conversation took place between you and Mr. Blount: "I am very glad to see you, Mr. Dreyer," and then handed you a copy of the demand he testifies to. "Do you want me to read this to you?" And you replied, "No; I guess not," and Mr. Blount then said, "If anything happens that you

should come to the bank for the purpose of turning over this money and I shouldn't be there I have provided that Mr. Jackson, the assistant cashier of the bank, shall receive it for me. I have
599 provided that I will receive it at the office or I am willing to go any place that you wish to go. I am here to comply with all the requirements that the supreme court requests me to clear my skirts, and I think you will say I have done it." And did you not reply, "I will give you an answer tomorrow," and is that not all that was said on that occasion?

A. That is positively not what was said. He only spoke a few words—clear my skirts, and all such conversation. I don't recollect anything about it.

Q. Do you say that you said anything more than that?

A. Yes, sir.

Q. Do you say that Mr. Blount said anything more than that?

A. He said, "Personally you have my hearty sympathy, but I am acting under directions." I believe I stepped a few steps aside there because I thought they were all reporters. I stepped to the elevator. I guess it was on the same floor.

Judge MORAN: Speak louder.

The WITNESS: I believe it was on this same floor. I stepped to the elevator because I thought they were all reporters.

Mr. BARNES: You got a copy of that demand from him, did you not?

A. Yes, sir.

Q. Never have attempted to turn over the money since?

The COURT: He doesn't claim it.

Mr. BARNES: We have a right to ask him whether he
600 turned it over. You asked him for all the conversation in regard to a demand. Now, I have a right to follow up the demand, and you know that you asked him for the purpose of bringing out some things from him on that matter that you couldn't get in any other way.

Judge MORAN: You will see.

Mr. BARNES: And which you know has nothing to do with the case. The question is whether I have the right to ask him now whether he turned over that money.

Judge MORAN: I ask that this speech be stricken out as impertinent.

The COURT: We will strike it out.

Mr. BARNES: Not as impertinent?

The COURT: No.

Mr. BARNES: I am willing it should go out, but not as impertinent.

The COURT: What is the question?

Mr. BARNES: Whether he has since complied with that demand.

The WITNESS: I have not.

Redirect examination by Judge MORAN:

Q. You were asked, Mr. Dreyer, by counsel if you hadn't turned over the balance of the account—the balance that stood to
601 the account of E. S. Dreyer, treasurer, in the National Bank of Illinois—to the account of E. S. Dreyer & Company because you wanted to pay up other drafts to that account.

A. Yes, sir.

Q. What was the reason you turned that over?

Which question was objected to by counsel for the People.

Judge MORAN: You asked him if he didn't do it because——

The COURT: Let him answer.

A. Because the president and vice-president of the bank told me to do so, and that they would honor all our checks on the West park board.

Mr. BARNES: I move to strike that out. It is the object which I will not characterize as impertinent to get in before the court what the court has ruled out.

Judge MORAN: I have a right to get in what the court has ruled out when counsel opens the door.

Mr. BARNES: I asked him if he did it for that purpose. You asked him if he wasn't requested to do it by the bank officers.

Judge MORAN: You asked him if he didn't do it because, and I asked him to state the "because"—because the president and vice-president of the bank told him to do it, and they would pay all the West park checks.

The COURT: The statement that they told him that they would pay all the West park checks is stricken out. The balance
602 may stand.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Adjourned until Tuesday, February 27th, 1900, at 10 a. m.

603 TUESDAY, *February 27th*, 1900—10 a. m.

Court met pursuant to adjournment; whereupon EDWARD S. DREYER, the defendant, was recalled as a witness on his own behalf, and testified as follows:

Redirect examination by Judge MORAN:

Q. I forgot to ask you yesterday, Mr. Dreyer, are you a married man.

A. Yes, sir.

Q. Have you a family?

A. Yes, sir.

Q. What family?

Mr. BARNES: I object. It is immaterial.

The COURT: I don't see how that is material.

Judge MORAN: I think all the circumstances as to his wife and

children are material, your honor. I never heard of such a thing being excluded in a criminal case in my life—the condition of the prisoner, the condition of the defendant with reference to his family, and his circumstances. I undertake to say it has never been done.

Mr. BARNES: You might have asked it as a preliminary question, but after the evidence is all in it is not redirect examination.

Judge MORAN: I said I forgot to ask him the question yesterday.

604 The COURT: If the only objection you make is that it is not redirect examination, the evidence will be admitted.

Mr. BARNES: I object to it as immaterial.

The COURT: I think it is immaterial.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Judge MORAN:

Q. Now, a question on redirect examination. How old are you, Mr. Dreyer?

A. Fifty-five years.

Q. Sixty-five?

A. Fifty-five years.

Q. You were asked yesterday how much you owed—E. S. Dreyer & Co. owed—the National Bank of Illinois about the time you became treasurer of the West park board. You stated you were not able to say at that time. Do you know now?

A. Well, it was about four or five hundred thousand dollars.

Q. Prior to that time had you been more largely indebted to the National Bank of Illinois?

Mr. BARNES: I don't know as I understood when he said it was four or five hundred thousand dollars.

Mr. AUSTRIAN: About the time that he became treasurer.

Mr. BARNES: About the time he became treasurer he owed four or five hundred thousand dollars?

Mr. AUSTRIAN: Yes, sir.

Mr. BARNES: Well, I object to what his relationship was prior to the time of his becoming treasurer.

The COURT: I don't see how that is material.

Judge MORAN: The counsel stated to the jury in opening
605 that he would show that it was Dreyer that made the National Bank of Illinois fail.

Mr. BARNES: No. I said that if you undertook to show that the National Bank of Illinois caused his failure, I should argue that it was more likely that he helped cause the failure of the National Bank of Illinois. I think that is my proposition.

Judge MORAN: Do you want to back out of that proposition now?

Mr. BARNES: You haven't shown anything——

Judge MORAN: I propose to show that prior to this time, in 1891, Dreyer & Co.'s bank owed the National Bank of Illinois a million dollars; that they paid it all up, and then that they commenced running

along again under the same agreement, same contract; the checks were paid, and that in the panic, after the panic of '93 set in, Dreyer's customers withdrew their funds out of his bank, after the failure of Schaffner & Co., and that it went on diminishing—the amount of money that he had on deposit in the National Bank of Illinois—and he sometimes drew it below the account—overdrew the account—but that it was paid them on the contract to pay all his checks on these collaterals that he had up.

The COURT: I don't think it is material at all.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

606 Judge MORAN:

(Q.) You were asked yesterday, Mr. Dreyer, if you used the funds of E. S. Dreyer & Co. for your living expenses. You answered that you did. How much did you take from those funds for living expenses?

Mr. BARNES: I object.

Judge MORAN: Well, if it was material to show it, it is material to show how much.

The COURT: He may answer.

A. $200 a month.

Recross-examination by Mr. BARNES:

Q. Did you also pay the expenses of the partnership out of those funds—clerks and the rent of your bank?

A. Out of the earnings.

Q. Were your earnings dumped into this account?

A. The money we made was dumped in the account.

Q. Did you have any other earnings in cash than what you had over there in the account of E. S. Dreyer & Co. and what was in cash in your own bank?

A. Yes, sir; there was to my account the rents which I collected.

Judge MORAN: A little louder.

A. There was in my account the rents which I collected.

Mr. BARNES: Where did you keep those moneys?

A. In my private account—profits.

Q. In which bank?

A. E. S. Dreyer & Co.

607 Q. Yes; but didn't you take all that cash and put that over in the account of E. S. Dreyer & Co.?

A. Yes, sir.

Q. Therefore all of the expenses of the firm—the rent that the firm of E. S. Dreyer & Co. had to pay, its clerk hire, all the expenses of the partnership—were checked out of the moneys then that were in E. S. Dreyer & Co.'s account?

A. Yes, sir; they were charged to the expense account, and were taken out of the earnings.

Q. Were what?
A. Taken out of the earnings of the company.
Q. Your earnings were in that account?
A. Yes, sir.
Q. And therefore all you made you put in the account, and all you paid out you paid out of that account. Isn't that right?
A. Yes, sir.
Q. Debts and all?
A. Debts?
Q. All your debts you paid out of that account?
A. Yes, sir.
Q. All your family expenses you paid out of that account?
A. Oh, no. I said $200, because my mother-in-law that I live with now—she is very wealthy——
Q. I am not asking you how you are living now. All I want to know is this: You say that you took $200 a month out of that account?
A. Yes, sir; for living expenses.
Q. How much did Mr. Berger take out of that account?
A. I don't know.

608 Judge MORAN: I object.
The COURT: I don't think this is material at all. It is not of any consequence what he did with the money.
Judge MORAN: It is not redirect examination.
The COURT: That point is sustained.

Mr. BARNES: There is one question I desire to ask Mr. Dreyer. Were these overdrafts on the National Bank of Illinois sometimes taken up by giving the National Bank of Illinois notes for them?
A. Yes, sir.

Judge MORAN: Is this some question you failed to ask on cross-examination?
Mr. BARNES: Well, I should think it would probably be more likely than that it would be on the redirect examination, although you brought out on the redirect examination about the drafts.
Judge MORAN: The court ruled out my questions on the redirect examination this morning on the overdrafts. I tried to show that they paid this indebtedness right along under the contract, notwithstanding the overdraft.
The COURT: That was anterior to the time he became treasurer?
Judge MORAN: Yes, sir, and after.
The COURT: If Mr. Barnes is enquiring about anything that took place before he became treasurer, I don't think it is material.
609 Mr. BARNES: Well, this is after.
The COURT: I don't see that it is of any consequence in this case what Mr. Dreyer did with the money.
Judge MORAN: I now offer in evidence from the certified copy of the record of the West Chicago park commissioners, dated Tuesday, January 10th, 1899, introduced in evidence here by the State, a communication, which was printed in the record, to the secretary of the

West Chicago park commissioners by Francis A. Riddle, the attorney of the board, and, in connection with that, the order of the circuit court of the United States for the northern district of Illinois, dated Tuesday, January 10th, 1899, the Honorable Peter S. Grosscup, district judge, in the case of The West Chicago Park Commissioners *vs.* John McNulta, receiver of the National Bank of Illinois, in the place and stead of John C. McKeon, former receiver of the National Bank of Illinois, at Chicago, and The National Bank of Illinois, at Chicago, showing the decree in that matter, and particularly the portion of that decree shown on page 2206 of this record, in which it is further adjudged and decreed.

Mr. BARNES: I object to it as immaterial.

The COURT: That is the same evidence, substantially, that has been offered before?

Judge MORAN: No, sir. I asked this of Mr. Kennedy, I think it was, who was on the stand, and it was objected to as not
610 cross-examination and ruled out. Now, I offer this certified copy of the decree—I mean I offer this decree from the records of the West park board itself.

The COURT: I don't think it is admissible.

Judge MORAN: I wish to suggest to your honor this: Suppose this judgment of the West park board had been actually paid, and the $316,000, with interest, that is alleged to be lost in this case was actually paid over to the hand of the West park board; does your honor say it would not be admissible?

The COURT: I do.

Judge MORAN: Your honor, then, holds that if the money alleged to be lost in this case is shown to be actually recovered, as the specific money, ear-marked and identified—if they recover the specific money and pay it over to the hands of the board, so that it is not lost, if it is actually paid over prior to the indictment and prior to the demand, that it nevertheless makes no defense?

The COURT: The court is not called upon to pass upon any state of case which it is not shown in any way or wise exists. You ask a hypothetical question. I will say this: The law requires this defendant to pay over this money upon demand, and the law does not declare that if, at the expiration of a lawsuit, a judgment is rendered against somebody else for the money, that that would be a defense.

Judge MORAN: No; but where the particular money is
611 recovered as I can show by this decree, ear-marked as I have shown it in this case by the checks traced to the National Bank of Illinois, and under the circumstances of this case, because every case must come under its own circumstances—here is the National Bank of Illinois, as has been shown in this case, the officers of it are on this bond. The president of the West park board was cashier of the National Bank of Illinois. The checks that are in evidence show, every one of them, the ear-marks of the West park board, every one of them. Every single draft from the county treasurer, every single particle of evidence that has been put in here, shows it to be the West park money, and it went into the National Bank of Illinois in that way. Now, this decree, your honor, is upon

the basis that that money was ear-marked, traced, and found in the National Bank of Illinois, and that it must be paid out of the National Bank of Illinois with interest upon it, and the sum was set aside in this decree. Now, your honor says that that is not evidence in the case for this defense. Would the payment of this judgment be evidence? Here is a sum of money set out. Now, this decree is appealed from, but that don't make any difference. That merely suspends it. That don't set it aside. They have a binding judgment against this receiver. It is merely suspended by the decree, that's all. Now, suppose that it should happen that this prisoner was convicted in this case, and that in ten days the money is
612 paid into the West park board, that identical money which it is alleged is lost. Is it not a circumstance to go in evidence in his favor in this case, when that decree was taken upon his evidence, if your honor please, in the United States court—upon his evidence of these facts that I have tried to show here to your honor? Are these not circumstances that change the character of this man's position with reference to this money? That is the purpose for which I offer that decree.

The COURT: Why, most certainly not. In the first place, that a cent could ever be recovered from the decree is not known. Nothing has ever been recovered. The decree is appealed from—the matter is in litigation, but whether or not it is in litigation or whether or not it was appealed from, it would be entirely immaterial in this case. The objection is sustained.

Judge MORAN: I except to your honor's ruling.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

(That part of the certified copy of the record of the West Chicago park commissioners offered in evidence, as above, is the decree of the circuit court of the United States, hereinafter set forth, beginning on the next succeeding page.)

613 Judge MORAN: I now offer a certified copy of the decree made by the clerk of the United States court. Let it be marked. I don't know that I have kept track of our number of exhibits, but mark it "Defendant's Exhibit X."

(The paper was so marked.)

Objected to by counsel for the People; which objection was sustained by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

(The said decree is in words and figures as follows, to wit:)

Decree.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

TUESDAY, *January 10th*, 1899.

Present: Hon. Peter S. Grosscup, district judge.

WEST CHICAGO PARK COMMISSIONERS
vs.
JOHN MCNULTA, Receiver of the National Bank of Illinois, at Chicago, in the Place and Stead of John C. McKeon, Formerly Receiver of the National Bank of Illinois, at Chicago, and The National Bank of Illinois, Chicago. } 24412.

This cause came on to be heard upon the bill of complaint
614 as amended, the answer and the amendments thereto of the defendants, the replications to said answers, the report of Frank L. Wean, special master, to whom this cause was heretofore referred by order of this court to take evidence and report the same to the court, with his findings of fact upon the same, upon the evidence so reported and upon exceptions of defendants to said special master's report, and was argued by counsel, and thereupon and upon consideration thereof it is ordered, adjudged, and decreed that the exceptions to said special master's report be, and the same are hereby, overruled.

And it is further ordered, adjudged, and decreed that the said report of the said special master be, and the same is hereby, in all things approved and confirmed.

And the court further finds that upon the twenty-first day of December, A. D. 1896, John C. McKeon was duly appointed receiver of the National Bank of Illinois, at Chicago, by the Comptroller of the Currency of the United States and entered into possession of the assets of said bank as such receiver upon said date, and he continued to be such receiver until the fourth day of January, A. D. 1896, when John McNulta was duly appointed as his successor in such receivership by the Comptroller of the Currency of the United States and took possession from the said John C. McKeon of the assets of said bank.

615 And the court further finds that upon said 21st day *day* of December, A. D. 1896, when said John C. McKeon was so appointed as receiver of the National Bank of Illinois, at Chicago, the said National Bank of Illinois, at Chicago, was indebted to the complainant in this cause, The West Chicago Park Commissioners, in the sum of three hundred and sixteen thousand and thirteen dollars and forty cents, which the court finds were complainant's funds, which, equitably considered, were deposited in the said National Bank of Illinois, at Chicago, and for which they had by reason of such deposit become liable to the said complainant, and which they had never paid out to the said complainant or on account of or by the order of said complainant.

Therefore it is further ordered, adjudged, and decreed by this court that the said complainant do have and recover from the said National Bank of Illinois, at Chicago, the said sum of three hundred and sixteen thousand and thirteen dollars and forty cents, together with interest, at the rate of five per cent. per annum thereon, from said 21st day of December, A. D. 1896, to the date of the payment of the same, which interest amounts at the date of the entry of this decree to thirty-one thousand four hundred and twenty-five dollars and seventy cents.

And it is further ordered, adjudged, and decreed that the said John McNulta, as receiver of the said National Bank of Illi-
616 nois, at Chicago, shall pay such ratable and proportionate part of three hundred and sixteen thousand and thirteen dollars and forty cents to said complainant, The West Chicago Park Commissioners, or its solicitor, as he or his predecessor has already paid for the amount due them respectively to depositors in said bank whose claims have heretofore been admitted and proven in the due course of his said receivership and before the payment by him of any further dividend upon any of the other admitted or proven claims against said National Bank of Illinois, at Chicago, and that the receiver also at the same time pay to complainant interest on the amount so here decreed to be paid, at the rate of five per cent. per annum, from and after the date and entry of this decree.

And it is further ordered, adjudged, and decreed that the said John McNulta, as receiver of the said National Bank of Illinois, at Chicago, pay to the said complainant the balance of said sum of three hundred and sixteen thousand and thirteen dollars and forty cents, and also interest as above provided from December 21st, 1896, on said three hundred and sixteen thousand and thirteen dollars and forty cents up to the date of the entry of this decree, and on such portion thereof from and after the date of the entry of this decree (upon which interest shall not be paid under the preceding clause of this decree) as from time to time remains upaid in the due course of the administration of his trust and office as receiver of
617 said National Bank of Illinois, at Chicago, ratably and proportionately as he pays such other indebtedness, with interest thereon, of the said National Bank of Illinois, at Chicago, as has been duly proven or admitted against said National Bank of Illinois, at Chicago.

And it is further ordered, adjudged, and decreed that the said complainant have and recover also from the said National Bank of Illinois, at Chicago, its costs in this cause, to be taxed, including the sum of five thousand dollars heretofore paid by it pursuant to the order of this court to Frank L. Wean, as special master, and that said costs shall be paid by the said John McNulta, receiver of the said National Bank of Illinois, at Chicago, in the due administration of the assets of said bank.

It is further ordered, adjudged, and decreed that the writ of injunction heretofore granted by the circuit court of Cook county, Illinois, in this cause, the same having been transferred from said court to this court, be, and the same is hereby, dissolved as to the further

administration of the assets of the National Bank of Illinois in the hands of said receiver, the same in that respect being superseded by this decree.

NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

618 I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the decree entered in said court on the tenth day of January, A. D. 1899, in the cause wherein West Chicago Park Commissioners is the complainant and John McNulta *et al.* are the defendants, as the same appears from the original records thereof now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this first day of August, A. D. 1899.

[SEAL.] S. W. BURNHAM, *Clerk.*

619 Judge MORAN: I offer also, your honor, a certified copy of the order of the superior court of Cook county appointing a receiver for E. S. Dreyer & Co.

Mr. BARNES: I have no objection to that.

(The paper was marked "Defendant's Exhibit Y," and is in words and figures as follows, to wit:)

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
County of Cook, }

Pleas before the Honorable Henry V. Freeman, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the seventh day, of December, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States of America the one hundred and twenty-first.

Present: The Honorable Henry V. Freeman, judge of the superior court of Cook county; Charles S. Deneen, State's attorney; James Pease, sheriff of Cook county.

Attest: JOHN A. LINN, *Clerk.*

620 Be it remembered that heretofore, to wit, on the twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six, the same being one of the days of the December term of the superior court of Cook county, the following, among other, proceedings were had in said court and entered of record, to wit:

EDWARD S. DREYER
vs.
ROBERT BERGER. } 179,386. Bill.

This day comes on to be heard the application of the complainant herein, by his solicitor, asking for the appointment of a receiver of all the copartnership property, assets, and effects of the copartnership composed of said Edward S. Dreyer and Robert Berger, heretofore doing business in the city of Chicago, county and State aforesaid, under the firm name and style of E. S. Dreyer & Co., and also asking for the issuance of an injunction herein, as hereinafter specified; and the defendant now appearing by his solicitor and having filed herein his answer to said bill and consented in open court to the entry of this order, and the court, having duly considered the matter and being fully advised in the premises, doth order and adjudge as follows:

1. That the Security, Title & Trust Company of Chicago, Illinois, a corporation duly authorized and empowered under the laws of the said State to act as receiver of estates and to administer trusts
621 of all kinds, be, and the same is hereby, appointed receiver of all of the property, assets, and effects, real, personal, and mixed, and wheresoever situated, now belonging to or to which the copartnership firm composed of said Edward S. Dreyer and Robert Berger, and so doing business under the firm name and style of E. S. Dreyer & Co., is entitled, whether in law or in equity, including all of the books, papers, and documents belonging to said copartnership.

2. That said receiver do forthwith take possession of all of said property, assets, and effects, real, personal, and mixed, and wheresoever situated, and of said books, papers, and documents.

3. That said Edward S. Dreyer and Robert Berger, so constituting said copartnership, do, for an- on behalf of said copartnership, forthwith execute and deliver to said receiver, and under the control and directions of a master in chancery of this court, a full, proper, and complete deed transferring and assigning to said receiver all of said property, assets, and effects, real, personal, and mixed, and wheresoever situate, belonging to or in which said copartnership is entitled at law or in equity.

4. That said Edward S. Dreyer and Robert Berger and their and each of their agents and representatives and all other persons whatsoever be, and they are hereby, enjoined from interfering or attempting to interfere in any way with said receiver or said property, essets, and effects or the rights of said receiver in the premises.

622 5. That said cause be, and the same is hereby, referred to Alexander F. Stevenson, Esq., a master in chancery of this court, and that said master shall summon before him said Edward S. Dreyer and Robert Berger for the purpose of directing and controlling the execution and delivery by them to said receiver of the deed as hereinbefore provided; that said master is hereby also directed, empowered, and authorized to ascertain and take an account-

ing between said parties, and he is hereby authorized to require to appear before him from time to time as he may specify and direct said parties hereto and such other parties as said master may deem proper or as the parties hereto may require for the purpose of ascertaining the true state of the accounts by and between the parties hereto, for the purpose of striking and stating an account, and also for the purpose of ascertaining, protecting, and conserving the assets and liabilities of said estate.

6. That any creditor of said copartnership, upon making proper showing to this court or to said master, be allowed to be present and participate, under the directions and control of said master, in the examination of said parties or of any other persons whom said master may be requested to subpœna before him for the purpose of investigating into the assets and liabilities of said estate and the whereabouts of the same.

7. That said receiver, which now here in open court does
623 accept said appointment, shall be, and hereby is, authorized and empowered to retain counsel and to hire a sufficient number of clerks and assistants and to incur other reasonable and proper expenses for rent, insurance, gas, and heat and other reasonable and proper purposes to enable said receiver to properly conduct and administer said estate.

8. This order is subject to such further orders, changes, and modifications as the court from time to time may direct in the premises.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John A. Linn, clerk of the superior court of Cook county in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete copy of a certain order made and entered of record in said court in a certain cause pending in said court, on the chancery side thereof, wherein Edward S. Dreyer is complainant and Robert Berger defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 1st day of September, A. D. 1899.

[SEAL.] JOHN A. LINN, *Clerk.*

624 Judge MORAN: Your honor will remember the other day I identified these books (indicating some bank pass books)?

The COURT: Bank books; yes, sir.

Judge MORAN: I didn't offer them then; I offer them now.

Mr. BARNES: You must offer them all if you offer them at all.

The COURT: You can offer them all and I think they are admissible.

Judge MORAN: I did consider offering them all. Counsel now says I must offer them all. I offer one of them.

Mr. BARNES: I don't object to your offering them at all.

Judge MORAN: You say I must offer them all. I offer one of them.

Mr. BARNES: I object to his offering one of them.

The COURT: I think he has a right to offer one. I don't see why one is not admissible.

Mr. BARNES: They are kept as memoranda of specific accounts and it only gives one particular account. He proposes to offer one—"George F. Talty, paymaster." These are merely memorandum of the West park board kept by them; never balanced up by the bank; that it was designed in each particular book to keep each specific account as it was kept directly by the West park board.

Judge MORAN: That is no reason why they are not admissible.

Mr. BARNES: If he is going to offer one of them to cover this account, he should offer them all.

625 The COURT: No; I think he may offer one if he wants to and pick out the one, but I think that anybody can have them all go in.

Judge MORAN: I offer this one (indicating). (To the reporter:) Mark it "X Y Z."

(The book was so marked and is in words and figures as follows, to wit:)

626 Which said deposit book so offered in evidence, as aforesaid, is in words and figures as follows, to wit:

"E. S. Dreyer & Co., bankers, Chicago, in account with West park commissioners, D. Colbert, collector."

"DR. E. S. Dreyer & Co., bankers, in account.

1895.		
"Oct. 19.	Deposit.....	$2,128.27
"Oct. 24.	"	162.00"

627 Judge MORAN: That is all.

Mr. BARNES: That is your case?

Judge MORAN: Yes, sir.

Whereupon the defendant rested his case, and the above was all the evidence offered, heard, or considered on behalf of the said defendant.

And the People, to further maintain the issues on their part, introduced the following evidence:

Mr. BARNES: I want Mr. Talty here.

Judge MORAN: Is he not here?

Mr. BARNES: No, sir.

Judge MORAN: What do you want to prove by him?

Mr. BARNES: I want to prove by Talty that this book was kept merely as a memorandum for the West park board.

Judge MORAN: I thought you wanted to prove it was never balanced?

Mr. BARNES: No; that shows for itself, that it was not balanced, but that it was merely kept as a memorandum by the West park board.

Judge MORAN: I don't think that would be admissible. It already appears how this book was kept. Money was paid in, a slip was

put in, and the writing here is the writing of E. S. Dreyer & Co.'s clerk—just like any other pass book.

628 Mr. BARNES: Mr. Talty was the secretary of the board and he used to have control of the books. These books were never left with the firm to be balanced up. It was merely a memorandum by which they could make out in their own books how much money was deposited in the bank aside from the report of the treasurer.

The COURT: I think Talty's evidence in that regard would be admissible.

Judge MORAN: The fact that it is not balanced appears from the book. That fact I am willing to admit.

The COURT: That appears from the book, I suppose?

Judge MORAN: Yes, sir; it never was balanced at all, but the book appears itself to be a book of money deposited to the particular account headed in it and entitled as all these books are.

Mr. BARNES: I will call Mr. Dreyer to the stand.

E. S. DREYER, the defendant, was recalled and testified as follows:

Examined by Mr. BARNES:

Judge MORAN: You make him your own witness?

Mr. BARNES: I recall him for cross-examination.

Q. Mr. Dreyer, did you regard the account which was kept in the books of your firm of E. S. Dreyer & Co. in the name of
629 the West park board as your account as treasurer of the West park board?

Judge MORAN: I object as not redirect examination.

The COURT: I think it is not redirect examination. I think the subject has been all gone over.

Mr. BARNES: Not with him.

Judge MORAN: Yes, sir; so far as the fact that you cross-examined him yourself.

Mr. BARNES: It is within the discretion of the court.

Judge MORAN: If you put it on the other ground I shall not object. You recall Dreyer in this case to prove something for yourself. Put it on that ground and you may go right ahead; be open about your plan.

Mr. BARNES: I am not concealing it at all.

Judge MORAN: You are trying to conceal it.

Mr. BARNES: What am I trying to conceal?

Judge MORAN: You are trying to conceal the fact that you are making the defendant your own witness on the matter.

Mr. BARNES: It is a matter within the discretion of the court.

The COURT: I think this matter has all been gone over. We don't want to go over this evidence two or three times.

Mr. BARNES: Not with him. I have not cross-examined him. The court will remember that the witness was called to testify on the direct examination as to the course of business with this account.

630 The COURT: Yes, sir.

Mr. BARNES: Now, I did not ask him a single question on cross-examination with relation to that. The hour was late; it had got to be about 5 o'clock. I asked him as to the course of business, as to how the checks came in and were paid out, as to the specific account. He was interrogated as to the account of E. S. Dreyer & Co. in the National Bank of Illinois, and upon that I did cross-examine him. Now, I did not ask him on the cross-examination, it cannot be found in the record, as to the course of business which he testified to upon the direct examination as to how the moneys that came into him as treasurer, in what form they came to him and how they were paid out by him as treasurer. Now, I say this: I ask the right of cross-examination upon that matter which, I think, is in the discretion of the court, inasmuch as there has been no redirect examination of any length.

The COURT: You may ask it. I want to get through with this case this week, and I will let you ask the question.

Judge MORAN: He has been over it. I want him to put it upon the honest ground——

The COURT: Well, it is rather immaterial.

Judge MORAN: He asked him about the $249,000, and asked him right down here what things occurred in the books of E. S. Dreyer & Co., and how the accounts were kept.

Mr. BARNES: You are speaking in a general way without
631 stating anything specific in regard to this question. I understand the court rules I may ask it.

Judge MORAN: Here is the question: "Mr. Dreyer, did you deposit all the moneys you received as treasurer of the West park board in this account up to this time?" That's the account of E. S. Dreyer.

Mr. BARNES (to the reporter): Read the question.

The question was read as follows: "Mr. Dreyer, did you regard the account which was kept in the books"——

Judge MORAN: I have a further objection. I think it is in the court's discretion to permit the counsel to cross-examine, but he has got to state that he forgot the question.

Mr. BARNES: No; I won't state that.

Judge MORAN: Then there is no ground for it.

Mr. BARNES: Very well; I will state that I forgot to go into that. (To the reporter:) Read the question.

(The question was read as follows: "Mr. Dreyer, did you regard the account which was kept in the books of your firm of E. S. Dreyer & Co. in the name of the West park board as your account as treasurer of the West park board?")

A. I did.

Mr. BARNES: The State rests.

Which was all the evidence offered or received on behalf of either party on the trial of said case.

632 Thereupon said defendant asked the court to give the instruction and to allow the two motions hereinafter set forth, but said court refused said instruction and refused to allow both or either of said motions; to which rulings and each thereof said defendant objected and excepted.

Said motions and instruction being as follows:

633 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS }
v. }
EDWARD S. DREYER. }

Now comes said defendant, Edward S. Dreyer, and moves the court herein to give the jury the following instruction:

The jury are instructed to find the defendant not guilty.

634 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS }
v. }
EDWARD S. DREYER. }

The jury are instructed to find the defendant not guilty.

635 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS }
v. }
EDWARD S. DREYER. }

Now comes the said defendant, Edward S. Dreyer, and moves the court to exclude all evidence offered, considered, and admitted in evidence on behalf of said People of the State of Illinois showing or tending to show what disposition was made by said defendant or E. S. Dreyer & Co. of the $316,013.40 alleged to have been in the hands of said defendant as treasurer of the West park board, and which it is alleged in said indictment he failed to turn over and pay to his successor in office, for the reason that such proof was offered and admitted in evidence for the purpose of showing that the failure to turn over said funds was not occasioned by unavoidable loss or accident and for the reason that the indictment herein does not allege that such failure to turn over was not occasioned by unavoidable loss or accident.

636 Thereupon Albert C. Barnes, assistant State's attorney, on behalf of the People of the State of Illinois, proceeded to argue said case to said jury, and, among other things, argued to said jury that at the time of the election of said defendant as treasurer of said West park board and at all times thereafter to and including December 19th, 1896, the said E. S. Dreyer & Co. were utterly insolvent.

637 The court further certifies that at the conclusion of all arguments on behalf of the People of the State of Illinois and said Edward S. Dreyer certain instructions were handed to the court by the State with the request that they be given to said jury, said instructions being as follows:

638 The defendant is charged by the indictment with a failure to turn over to his successor in office as treasurer of the West park board funds of said board received by him as such treasurer, and not disbursed for said board. If you so find the facts to be from the evidence beyond a reasonable doubt, then the only remaining question of facts raised by the evidence is whether such failure was occasioned by unavoidable loss. In determining this question it is not only your duty to consider all of the evidence in the case, but also the duties imposed by law upon such treasurer to safely keep the funds that come into his hands or to deposit the same with some solvent or responsible depositary that would pay the interest on the same then required by law. (Given.)

2. The jury are instructed that they are to determine the facts in the case from the evidence in the case, and not from statements made by counsel in argument; and if counsel, in their arguments, have stated as facts in the case matters which do not appear in evidence or which are not properly inferable therefrom, then you should disregard such statements. (Given.)

3. If you believe from the evidence, beyond a reasonable doubt, that on December 21, 1896, Fred M. Blount was duly elected and began to act as successor in office to the defendant, Edward S. Dreyer, as treasurer of the West Chicago park commissioners, and that he has been elected and has since continued to act as such treasurer each year up to the date of his indictment, February 4, 1899, then it is immaterial to the issues of this case whether said Blount has properly qualified as such treasurer or not. (Given.)

4. It is immaterial to the issues in this case that the demand offered in evidence does not purport to have been made until January 31, 1899. Nor are the jury to inquire in the absence of

639 evidence upon that point whether there was any demand or attempt to make a demand prior to that time, nor is it material.

The written demand received in evidence is in form and substance sufficient in law for the purposes of the demand required by the act under which the defendant is indicted. (Given.)

5. The act of the legislature approved June 17, 1893, and in force June 1, 1893, entitled "An act to compel State, county, city, township, school and park treasurers, and other custodians of public funds, to account for interest on such funds under their control," did not

operate to destroy the trust relationship under which said funds were to be held or accounted for by the custodian thereof; and unless there be evidence of such use of the funds involved in this case as was contemplated by this act and a loss occasioned by such use, said act will not excuse the defendant as such custodian of such funds from a failure to pay over or deliver the same to his successor in office after a proper demand therefor is made upon him, if you find as aforesaid such demand was made, even though he or the firm to which he belonged paid interest on the same as required by such act. (Given.)

6. The statute of this State declares that "a criminal offense consists in the violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence;" the statute further provides that "intention is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused." Therefore, if one voluntarily do what is in fact a violation of a public law, then there is the requisite "union or joint operation of act and intention" required by law to make such act a crime. And in this connection
640 the court instructs the jury that the statute under which the defendant is indicted makes it a crime punishable in the penitentiary if the treasurer of a public fund, like the fund in question in this case, receives and has not disbursed the same as such treasurer and fails to deliver the funds so undisbursed over to his successor in office, as required by law, after a proper demand therefor, provided the same amounts to more than one hundred dollars and provided the failure to turn it over is not caused by unavoidable loss or accident. If, therefore, the jury believe from the evidence in this case beyond a reasonable doubt that said Dreyer, as treasurer of the West park board, received its funds, and when he ceased to be treasurer owed said West park board over $300,000, and that a demand therefor was made by his successor in office, as alleged in the indictment, and that he has failed to comply with said demand, and that such failure to pay over said moneys was not due to unavoidable loss as the same has been explained in these instructions and as contemplated by said statute, then it is not requisite upon the part of the State to prove any other act or intention to make such conduct a crime and a felony under the law. And in this connection the court instructs you that this interpretation of the law is in nowise changed by the use of the word "felonious" in the indictment. (Given.)

7. If the jury believes from the evidence, beyond a reasonable doubt, that the defendant, Edward S. Dreyer, was duly appointed to and accepted the office of treasurer of the board of West Chicago park commissioners, and continued in said office and to act as such treasurer thereafter up to the appointment of a successor to such office; that as such treasurer said Dreyer received into his possession and custody its funds or moneys; that Fred M. Blount, on
641 December 21, 1896, was duly appointed and qualified or became and acted as successor of said Dreyer as treasurer afore-

said and has continued to be or to act as such treasurer ever since said date; that at the time of the appointment and qualification of said Blount or his beginning to act as successor as aforesaid, a portion of said funds or moneys so received by said Dreyer had not been disbursed by said board, or by said Dreyer for said board, or paid over by him to said board, or to any person for said board; and that the amount in value of the funds or moneys so received and undisbursed by said Dreyer was more than one hundred dollars of United States currency; that a demand by said Blount as such successor and as such treasurer of said board was on January 31, 1899, made in person by him upon said Dreyer for such funds or moneys so received and undisbursed; that after said demand said Dreyer failed to pay over the funds or moneys so received and so undisbursed of the value of more than one hundred dollars of United States currency, to said Blount as his successor, or such treasurer, then you should find the defendant guilty in manner and form as charged in the indictment, unless it appears from the evidence that such failure to pay over such funds was occasioned by unavoidable loss or accident. The statute makes the unavoidable loss or loss by accident of such funds a matter of defense, and if from all the evidence no such defense has been made out it remains your duty to find the defendant guilty. (Given.)

8. If the jury believe from the evidence beyond a reasonable doubt that the defendant is the E. S. Dreyer of the banking firm of E. S. Dreyer & Co.; that the account in evidence on the books of said firm, designated and referred to as the "West Park
642 Board" account, was made up of deposits of funds belonging to the West Chicago park commissioners, known as such board; that the defendant was treasurer thereof when such deposits were made, and that as such treasurer he was required by the rules of said board to act as its financial agent for the receipt and distribution of its funds and to keep the deposit account wherever kept in the name of the board; that in pursuance of such rules he kept the deposit account in such name in such bank; that the payments made from the same were by drafts or warrants of said board upon him as such treasurer, and that the same were paid out of such account with his knowledge, expressed or implied, and that this was the usual course of business in dealing with such account, then although the deposit was in the name of said board it was in law the deposit of defendant as treasurer of said board, and he thus being a partner of such firm there is no difference in law as to his legal responsibility and liability therefor between a deposit so made with his firm and one made with him individually as a banker. Under such a state of facts, the defendant was responsible and liable as such treasurer for the payment of any moneys out of such account, and was required to turn over all of such money-, if any, as were not disbursed or paid out for the account of said "West park board," to his successor in office. (Given.)

9. Even though by the deposit of said funds and moneys in said bank in the name of said board the bank by law became debtor to said board for said account, yet that fact alone would not, under a

state of facts as set forth in the foregoing instruction, relieve said Dreyer from liability to account to the board for said fund and moneys as such treasurer. Nor under such a state of facts
643 would the failure of such firm alone and appointment of receiver therefor relieve defendant from his liability under the law for failure to turn over such funds to his successor after proper demand therefor, if there was such failure and demand, without additional evidence from which the jury might infer that the funds or moneys were lost by reason of such failure and not before, and further evidence that such failure to turn over such funds to his successor was not occasioned by unavoidable loss or accident. (Given.)

10. If the jury further find from the evidence as additional facts, as claimed by the defense as well as the State, that the firm of E. S. Dreyer & Co. kept an account in its name in the National Bank of Illinois; that said firm "cleared," to use a banking term, through said bank—that is, that said bank collected for E. S. Dreyer & Co. all checks on other banks deposited for collection with E. S. Dreyer & Co. and paid all checks coming through the other banks or clearing-house drawn on E. S. Dreyer & Co., and that the account of E. S. Dreyer & Co. in said bank was credited with such collections and charged with such payments; that among such checks or drafts so collected and so paid out were those in favor of and those drawn on the account kept in the books of E. S. Dreyer & Co. in the name of the "West park board," yet such additional facts in no way altered the character of the funds that went into said "West Park Board" account or the relationship of the defendant thereto or his responsibility therefor. His legal relation and liability as to such account under such a state of facts, if you so find them to be, were the same as if E. S. Dreyer & Co. had been a member of the clearing-house and had collected and paid out the checks themselves, without the agency of the National Bank of Illinois.

644 And if the National Bank of Illinois permitted the firm of E. S. Dreyer & Co. to overdraw its account in said bank, or made an arrangement to honor and pay all checks drawn on the accounts in E. S. Dreyer & Co.'s bank, whether the said firm had money in the National Bank of Illinois or not, still that fact would not alone, or with all the foregoing, if found as facts as aforesaid, change or alter the defendant's responsibility as treasurer of said fund or his liability therefor under the law under which he is here indicted. (Given.)

11. If you find from the evidence, beyond a reasonable doubt, that the defendant, as treasurer aforesaid, deposited the board's moneys in his banking firm as aforesaid, as stated in previous instructions, under the law as it then stood, it was the duty of defendant, as treasurer of said board, to place the moneys that came to his custody with some responsible depositary, if accessible, that would pay interest at the rate of at least two per cent. per annum on the daily balances of the moneys not drawn out for the board. If there was such a responsible depositary accessible, he was to account for such interest and receive one-fourth of the same for his compensation. But as

such treasurer he was bound to exercise due care and diligence in selecting the depositary for such funds. He also was presumed by law to know the condition of the firm of which he was an active member; and if you find from the evidence beyond a reasonable doubt that as such treasurer he credited the moneys of the "West park board" in an account by that name in the books of E. S. Dreyer & Co., and charged such firm or himself with interest thereon, then in legal effect such transaction did not differ from a use of such moneys by himself, and on a failure to account for the same the
645 law under such circumstances would hold him as trustee to the strictest accountability for the use to which such funds were put. If, therefore, you further find from the evidence, beyond a reasonable doubt, that he ceased to act as such treasurer on or about December 21, 1896, and that Fred M. Blount then became his successor, and that there then remained a credit of over $300,000, to such account of the West park board on the books of said firm, and that the same had not been disbursed for said board; that a personal demand by said Blount as such treasurer and successor, in manner and form as charged in the indictment, was made upon the defendant as such former treasurer to pay over such undisbursed moneys, and he has failed so to do; and that at the same time, on or about December 21, 1896, said firm of E. S. Dreyer & Company failed, or ceased to continue business, and that all the cash said firm had at that time was less than $600 in the National Bank of Illinois, and less than $6,000 in its own bank, to meet all its liabilities, and that the balance of funds so due the said West park board in excess of the cash of the firm of E. S. Dreyer & Company then on hand had been used by said firm to pay its debts and the expenses of its business, and that said firm was at the time of its failure largely indebted to the National Bank of Illinois, and had been so indebted during the entire time that the defendant was treasurer of said board, and that such indebtedness had increased from year to year from the time of his appointment as such treasurer to the time of his failure and ceasing to act as such treasurer, and that he was relying upon being given further credit by the National Bank of Illinois in order to meet the demands of said West park board upon him as treasurer, then you should find the defendant guilty. (Given.)

646 12. Unless the firm of E. S. Dreyer & Co. or the defendant had to their or his credit in the National Bank of Illinois when it failed or went into the hands of a receiver a sum equal to the credit of the West park board on the books of E. S. Dreyer & Company at such time, then the failure of, or appointment of a receiver for, the National Bank of Illinois cannot be considered as evidence of unavoidable loss of any portion of such funds of the West park board if the same were lost. (Given.)

13. The fact that the National Bank of Illinois had a good reputation and financial standing among bankers and business men when it failed or ceased to do business affords no defense in this case unless it appears from the evidence that the defendant or the firm of E. S. Dreyer & Co. had at the time of such failure as much cash

in said bank as the evidence shows he owed as treasurer of the West park board. (Given.)

14. The fact that Carl Moll was cashier of the National Bank of Illinois and president of the West park board for a time while said Edward S. Dreyer was treasurer of said board and while the firm of E. S. Dreyer & Co. kept an account in said bank, does not of itself or in connection with the claimed fact that George Schneider was president of the National Bank of Illinois at said time and one of the sureties on Dreyer's bonds, or in further connection with any so-called arrangement that has been testified to in this case that said bank was to honor checks of E. S. Dreyer & Company, furnish legal grounds for the exemption of said Dreyer from liability as such treasurer to turn over to his successor in office any funds that may have been in his possession at the time he ceased to be treasurer belonging to the West park board; provided, you believe
647 from the evidence, beyond a reasonable doubt, he did have in his possession as said treasurer funds of such character when he ceased to be treasurer of said board. (Given.)

15. The jury are instructed that their verdict is to be based upon the evidence in the case and the law applicable thereto; that they are not authorized to find as a fact that which does not appear from the evidence in the case, unless it be a matter of which courts take judicial notice, or a matter which all persons are presumed to know. In order to find that the funds or money in question were lost there must be evidence in the case from which their loss may be properly inferred. And even though you may believe from the evidence that said funds were lost, and that the defendant failed to pay over the same on demand, in manner and form as alleged in the indictment, yet you are instructed that unless there is evidence in the case to show how such funds were lost, you cannot go outside of the evidence to determine whether such failure to pay over or deliver said funds or money to the successor was occasioned by unavoidable loss. (Given.)

16. While the burden of proving the offense charged in the indictment beyond a reasonable doubt rests upon the State, yet if you believe from the evidence, beyond a reasonable doubt, that the defendant failed to pay over funds or moneys of the West Chicago park commissioners received by him as their treasurer and not disbursed, in amount and value to exceed $100 in United States currency, to his successor in office after a personal demand upon him by his successor therefor, in manner and form as charged in the indictment, then it becomes a matter of defense to show that such failure to pay over the same was occasioned by unavoidable loss or accident. And in the absence of any evidence from which
648 to find that such failure was caused by unavoidable loss or accident, you should find the defendant guilty. (Given.)

17. In this State an accused is permitted to testify in his own behalf, and when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded to his

testimony, the jury have a right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor and conduct upon the witness stand. (Given.)

18. The defendant has put in evidence his general reputation for honesty and integrity; such evidence is permissible under the law, and is to be by the jury considered as a circumstance in this case. But the court further instructs the jury that if from all the evidence in this case they are satisfied beyond a reasonable doubt of the guilt of the accused, then it is the duty of the jury to find him guilty, notwithstanding the fact that heretofore the accused has borne a very good character for honesty. (Given.)

19. It is immaterial to the issues of this case how much security the firm of E. S. Dreyer & Company may have placed with the National Bank of Illinois as collateral for its indebtedness to said bank. (Given.)

20. It is immaterial to the issues of this case what was the amount of the bonds given by E. S. Dreyer as treasurer to the West park board or who were the sureties thereon, except to show that he qualified as treasurer. Such bonds have no other bearing on the question of whether the defendant is guilty of the charge made against him in the indictment. (Given.)

649 21. Every person is presumed to intend the usual, natural and probable consequences of his act.

When a person does an act which the law pronounces a crime, if the act was done deliberately and intentionally, then the doing of the act is criminal although the person did not know of the existence of the law and consequently did not intend to do a criminal act; it is the intent to do the act and the actual doing of it which constitutes the crime; to constitute a crime it is not necessary that an act should be done with an intent to commit a criminal act; a mere accident is not a crime; if one merely accidentally do a thing the doing is not a crime.

So as to what is known by a felony. If one intentionally do an act which the law declares a felony, he is guilty of the crime of felony although he may not have known that the act was a felony or may not have heard the word felony and knew nothing as to its meaning.

The question presented to you in this case is not, did the defendant intend to commit a crime or a felony, but did he intend to do, and do, the act charged in the indictment which the law declares to be a crime and a felony. (Given.)

22. Evidence has been introduced tending to show what the defendant as treasurer of the West park board did with the money by it entrusted to him as such treasurer. If you do not believe from the evidence that he intended to do what the evidence shows he did do with such money, then you will find the defendant not guilty.

The loss of the funds by the failure of a reputable bank in which a treasurer of public funds had deposited them and in which they were at the time of such failure would probably be an una-

650 voidable loss; the failure of a reputable bank in which such treasurer did not have more than $1,000 is not an unavoida-

ble loss of $300,000, although such bank may have promised to pay his checks.

Nor would the loss of the money by the decline in value of real estate, if the same were invested therein by the defendant, constitute an unavoidable loss. (Given.)

23. The rule which clothes every person accused of crime with the presumption of innocence, and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of the law intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished. (Given.)

24. The court has no right to instruct or tell you as to the facts in this case, and nothing in the instructions is meant to be or is to be taken as any intimation by the court as to what the facts of the case are. It is the right and duty of the court to instruct you as to the law. (Given.)

25. The jury are the judges of the law as well as the facts in the case, and if they can say upon their oaths that they know the law better than the court does, they have a right to do so; but before assuming so solemn a responsibility they should be assured that they are not acting from caprice or prejudice, that they are not controlled by their wills or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court. If, under all the circumstances, they are pre-
651 pared to say that the court is wrong in its exposition of the law, the statute has given them the right. (Given.)

26. The rule requiring the jury to be satisfied of the defendant's guilt from the evidence beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each material link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony together, the jury are satisfied beyond a reasonable doubt that the defendant is guilty. The reasonable doubt that the jury is permitted to entertain must be as to the guilt of the accused, on the whole evidence, and not as to any particular fact in the case. (Given.)

27. The doubt which the juror is allowed to retain in his own mind and under the influences of which he should frame a verdict of not guilty must always be a reasonable one. A doubt produced to undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible states of the case different from that established by the evidence.

You are not at liberty to disbelieve as jurors if, from the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath has been administered. (Given.)

28. In considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt to justify an ac-
652 quittal *it* must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause it is insufficient to authorize a verdict of not guilty.

If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt. (Given.)

29. If the jury find the defendant not guilty they will so state in their verdict; and if they find the defendant guilty they will so state in their verdict; and if guilty, they will also state in their verdict the amount in valueof the money or funds not paid over; and if they find the amount in value to be $100 or more, they will fix his punishment to be imprisonment in the penitentiary without specifying the term thereof. (Given.)

That said court thereupon gave each and every of said instructions, to the giving of said instructions, and each of them, said defendant objected and excepted.

That thereupon said court gave to said jury on behalf of said defendant certain instructions, and the court here certifies that such instructions were theretofore requested to be given to said jury by said defendant; that such instructions when handed by said defendant to said court were without alteration or interlineation; that the instructions so given were altered and changed by said court of his own motion, as such instructions appear upon their faces to have been altered or changed; that to the alteration of such instructions, and each thereof, said defendant objected and excepted, and to the giving of the same, and each thereof as so altered, and the failure to give the same as requested, said defendant objected and excepted.

Said instructions being as follows:

1. The indictment in this case is of itself a mere accusation or charge against the defendants, and is not, of itself, any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant, because or on account of the indictment in this case. (Given.)

2. The burden of proof rests upon the prosecution to make
653 out and prove to the satisfaction of the jury beyond a reasonable doubt every material allegation in the indictment, and unless this has been done the jury should find the defendant not guilty. (Given.)

3. In the State of Illinois the definition of a criminal offense is a violation of a public law in the commission of which there shall be a union or joint operation of act and intention or criminal negligence, and the statute upon which the indictment in the case on trial is based should be read and construed by the jury as if said definition of a criminal offense was in its words and terms actually incorporated into said statute. (Given.)

4. A criminal offense consists in the violation of the public law

in the commission of which there should be a union or joint operation of act and intention or criminal negligence. The jury should not let prejudice influence them for or against the defendant. They should not on account of any desire to please any one convict or acquit him, but they should be governed solely by the law and the evidence in this case, and unless they can say upon their oaths, after considering all the evidence, that they have an abiding faith of the truth of the charge upon which he is now being tried, they should find him not guilty, although they may from the evidence believe him guilty of some other offense. (And if they believe from the evidence beyond a reasonable doubt that the defendant is guilty in manner and form charged in the indictment, they shall so find.) (Given.)

5. Matters of fact, if any, which are left uncertain by the evidence cannot be made certain to the prejudice of the defendant by inference. In the absence of evidence no inference can be drawn by the jury against the defendant, but, on the contrary, all the inferences and presumptions consistent with the facts proven are to be drawn and indulged in favor of innocence. (Given.)

654 6. The defendant in this case cannot be found guilty of withholding or failing to turn over to his successor funds of the West Chicago park commissioners which were never delivered to or never came into the hands of said defendant, and if the jury believe from the evidence that all funds which are shown by the evidence to have been delivered to defendant were lawfully paid out by him for the West Chicago park commissioners, then the jury will find the defendant not guilty. (Given.)

7. In order to warrant a conviction of the defendant Dreyer in this case, it is incumbent on the prosecution to prove beyond a reasonable doubt each of the following propositions:

First. That at the time the witness, Fred M. Blount, made a demand on the defendant, E. S. Dreyer, for whatever funds, moneys and securities the said Dreyer had in his possession which were the property of the West Chicago park commissioners, there was due the said West Chicago park commissioners from the said E. S. Dreyer, as the ex-treasurer of said commissioners, a certain sum of money not less than one hundred dollars;

Second. That said Dreyer failed or refused to pay or deliver to said Fred M. Blount the sum of money which was due the said West Chicago park commissioners.

8. The burden of proof in the case on trial means that the

655 defendant should be found not guilty unless it appears from all the evidence in the case beyond a reasonable doubt that the failure or refusal of the defendant, E. S. Dreyer, to pay or to deliver to Fred M. Blount what was demanded by said Fred M. Blount as treasurer of the West Chicago park commissioners from said Dreyer was not occasioned by unavoidable loss or accident. (Given.)

9. The burden of proof is upon the person charging a financial agent with want of care or prudence to prove the same. (Given.)

10. If the jury believe from the evidence that the bank of E. S. Dreyer & Co. closed its business on December 19, 1896, and did not

thereafter open its doors for business, such fact of itself furnishes evidence tending to show that deposits previously made therein, and not theretofore withdrawn, are lost. (Given.)

11. Solvency, as a matter of law, is merely an ability to meet obligations as they mature; and to constitute the solvency of E. S. Dreyer & Co. it was not necessary as a matter of law that E. S. Dreyer & Co. should have sufficient cash on hand to be able to pay at once all existing obligations before they were demanded or before the same matured.

(So soon as E. S. Dreyer & Co. failed to meet their matured obligations upon demand for their payment they became and were in law insolvent.) (Given.)

12. The law presumes that a bank which receives deposits is solvent as long as its continues to receive deposits, and unless the jury find from all the evidence that the banking-house of E. S. Dreyer & Co. was insolvent at the time of receiving deposits, the jury must presume that the banking-house of E. S. Dreyer & Co. was solvent at the time of receiving deposits and so long as it continued to receive deposits. (Given.)

656 13. Under the rules offered in evidence by which the West Chicago park commissioners prescribe the duties of the treasurer of the West Chicago park commissioners, the said treasurer is merely the financial agent of such West Chicago park commissioners, and is not bound or authorized thereunder to collect, receive, safely keep or disburse any money, funds or warrants belonging to said West Chicago park commissioners, except as such money, funds or warrants were by said West Chicago park commissioners, or in accordance with its orders, were by its agents placed in his hands and by him received as such treasurer. (Given.)

14. During the years 1894, 1895 and 1896, the treasurer of the West Chicago park commissioners was, by law, required to account for interest on the daily balances of the funds from time to time in his custody at a rate of not less than 2 per cent. per annum, and to pay three-fourths of such interest to the West Chicago park commissioners, if such treasurer did not keep such funds in his personal possession and not in a bank, or on deposit for the purpose of receiving interest on the same. (Given.)

15. If the jury find from the evidence that the failure, if any, of the defendant to pay over all funds received by him as treasurer of the West Chicago park commissioners to his successor was caused by the loss of such funds which he failed to pay over by reason of the suspension or closing of a banking-house in which same were deposited and permitted to remain by him in the exercise of reasonable and ordinary prudence and without intent to defraud, they shall find the defendant not guilty. (Provided the defendant had in such banking-house at the time of its failure within $100 of the entire amount of the funds of the West park commissioners which he as their treasurer then held.) (Given.)

657 16. Evidence of previous good character is competent evidence to be considered by the jury in favor of the defendant, as tending to show that he would not be likely to commit the crime

alleged in the indictment, and if the jury believe from the evidence that prior to the commission of the alleged crime the defendant had always borne a good character for honesty among his acquaintances, and in the neighborhood in which he lived, this fact is to be considered by the jury, together with all the other facts in the case; and if after considering all of the evidence in the case, including that with reference to the previous good character of the defendant, the jury entertain any reasonable doubt of the defendant's guilt, then it is their duty to find the defendant not guilty. (Given.)

17. The reasonable doubt which would justify an acquittal of the defendant need not be established affirmatively by the evidence in the case. The true rule is that the defendant should be acquitted unless it clearly appears from all the evidence that a reasonable doubt of the guilt of the defendant has been affirmatively excluded by the evidence. A reasonable doubt may arise from the want of evidence as well as from evidence, and a reasonable doubt may arise also from the nature and character of the evidence introduced, if the minds of the jurors are not convinced from the nature and character of the evidence of the truth of the facts required to be proven in order to warrant a conviction. (Given.)

658 That said defendant requested said court to give other instructions, which said instructions and each thereof said court refused to give to said jury, and to the refusal to give said instructions and each thereof said defendant objected and excepted, said instructions so refused being as follows:

659 1. The jury are instructed, as a matter of law, that they are the judges of all questions of law and fact material to be considered in arriving at a verdict in this case; that any issue of law material to the determination of the question of guilt or innocence of the accused must be ultimately and finally determined by the jury; and if after hearing the discussion of counsel upon any question of law and reading and considering the instructions of the judge of the court bearing upon such issue, the jury have a reasonable doubt as to whether the issue of law ought to be decided against the defendant, they are bound under their oaths to give the defendant the benefit of such reasonable doubt and decide such issue of law in his favor. (Refused.)

2. The jury are instructed as a matter of law, under the law of this State, as it stood while defendant Dreyer was treasurer of the West Chicago park commissioners, he, as such treasurer, was required to account for and pay interest upon the daily balances of said funds in his hands at the rate of not less than three-fourths of 2 per cent. per annum, and as much higher as solvent banks that were accessible were willing to pay on daily balances of accounts, subject to sight draft or check, and if you believe from the evidence that the defendant Dreyer did deposit said funds in his hands with any copartnership or banking institution in order to make the said funds bear interest, then the said defendant, Dreyer, cannot be convicted in this case for failing to turn over any such funds to his successor, if it appears from the evidence that such funds were lost by the failure of the copartnership or banking-house with which the

same were deposited in order to make them earn interest, unless the jury believe from the evidence, beyond a reasonable doubt, that such funds were deposited by said defendant with such copartnership or banking-house negligently and without the exercise of ordinary care and prudence. (Refused.)

660 3. In the case on trial, the burden of proof is upon the prosecution to show, beyond a reasonable doubt, that the defendant, E. S. Dreyer, feloniously failed or refused to pay or deliver to Fred M. Blount what was demanded by said Fred M. Blount, as treasurer of the West Chicago park commissioners, from said Dreyer. (Refused.)

4. The court instructs the jury that the presumption of innocence in the case at bar means that the law presumes that the failure or refusal of E. S. Dreyer to pay or deliver to Fred M. Blount what was demanded by said Fred M. Blount, as treasurer of the West Chicago park commissioners, from said Dreyer, was occasioned by unavoidable loss or accident; and this presumption, as so explained to the jury, should continue and prevail in the minds of the jury in such a way as to cause the jury to find the defendant not guilty, unless from all the evidence in the case the jury are convinced beyond a reasonable doubt that the defendant is guilty in manner and form as charged. (Refused.)

5. The court instructs the jury, as a matter of law, that in considering the fact whether or not the firm of E. S. Dreyer & Co. was solvent at the time of the receipt of the moneys of the West park board, that they are to take into consideration all the evidence as to the moneys which said E. S. Dreyer & Co. had, as well as all property and securities which they owned of whatever nature, kind, or description. (Refused.)

6. The jury are instructed, as a matter of law, that it was the duty of the defendant, Dreyer, not to deliver any funds in his hands as treasurer of the West Chicago park commissioners to the person claiming to be his successor until his term of office had determined, either by lapse of time, resignation or removal. (Refused.)

661 7. The jury are instructed, as a matter of law, that the resolution of the West Chicago park board, introduced in evidence, showing the appointment and election of Blount as successor in office of the defendant, reciting the removal of the defendant, is not competent evidence to show that the defendant ever was in fact removed as treasurer of the West Chicago park commissioners. (Refused.)

8. The court instructs the jury, as a matter of law, that the defendant, Edward S. Dreyer, has once been put in jeopardy for the offense charged in the indictment herein. The jury are therefore instructed to find the defendant not guilty of the crime charged in the indictment herein. (Refused.)

9. The court instructs the jury that a criminal offense consists in a violation of a public law in the commission of which there shall be a union or joint operation of act and intention or criminal carelessness. (Refused.)

10. If the jury shall believe from the evidence that the firm of E. S.

Dreyer & Co. had for many years prior to April 14, 1894, kept an account with the National Bank of Illinois, and shall further believe from the evidence that said E. S. Dreyer & Co. had deposited with the National Bank of Illinois collateral securities, consisting of lands, mortgages and other securities, under an agreement with the said National Bank of Illinois that they would pay all checks of E. S. Dreyer & Co. drawn on said bank, and that during the time that the funds of the West park board were deposited with E. S. Dreyer & Co. in their account in the National Bank of Illinois, said agreement was operating, as between said E. S. Dreyer & Co. and said National Bank of Illinois, and that said National Bank of Illinois under said agreement paid all drafts and
662 checks rightfully drawn on the said National Bank of Illinois for the account of E. S. Dreyer & Co. in favor of the West park board, without reference to the fact as to whether the account of E. S. Dreyer & Co. in said National Bank of Illinois was overdrawn or not, then the jury are instructed that E. S. Dreyer was warranted in acting upon the presumption that the National Bank of Illinois would continue such course of business and would pay all checks drawn by E. S. Dreyer & Co. on said National Bank of Illinois in favor of the West park board as long as the funds of the West park board were deposited in said National Bank of Illinois, to the account of E. S. Dreyer & Co.; and if the jury shall believe from the evidence that said funds of the West park board would continue to be paid out by the National Bank of Illinois on the checks of E. S. Dreyer & Co. in favor of the West park board if the National Bank of Illinois had not been taken possession of by the United States Comptroller of Currency, then the jury are instructed that the closing of said National Bank of Illinois by its being so taken possession of by the United States Comptroller of Currency was an accident within the meaning of the statute of section 215 of the Criminal Statute of Illinois, which prevented E. S. Dreyer from turning over to his successor in office the funds of the West park board. (Refused)

11. If the jury shall believe from the evidence that the West park commissioners have instituted an action against the National Bank of Illinois to recover from said bank the money of the West park board deposited in said bank by E. S. Dreyer & Co., and that in said action so instituted said West park commissioners have recovered a
663 judgment against the National Bank of Illinois and its receiver, in and by which said judgment said receiver is directed to pay to the West Chicago park commissioners the $316,000, with interest thereon, alleged to have been lost by said Edward S. Dreyer, by depositing the same to the credit of E. S. Dreyer & Co. in the said National Bank of Illinois, and that said sum has by said decree been directed to be set aside to be paid to the said West Chicago park commissioners, then the jury are instructed that the said $316,000 of the said West park commissioners is not and has not been lost, and that the said defendant, Edward S. Dreyer, cannot be convicted in this case for failure to pay over the same to his successor on demand. (Refused.)

12. The court instructs the jury that evidence of general good character is competent evidence to be considered by the jury in favor of the defendant in connection with all the other evidence in the case, and if the jury shall believe from the evidence that the defendant, Dreyer, has in this case proved his previous good character, then the jury should take such evidence into consideration, and if, after considering such evidence in connection with all the other evidence in the case, the jury entertain any reasonable doubt of the defendant's guilt, it is their duty to find the defendant not guilty. (Refused.)

The jury are instructed, as a matter of law, that a financial agent whose duty it is to make funds in his hands bear interest for the benefit of his principal by depositing such funds in a responsible depositary that will allow and pay interest thereon, can only be held to good faith and ordinary care and prudence in selecting such depositary, and if such funds are lost to the principal by reason of the failure of the depositary in which the financial agent has
664 placed them, the principal cannot recover against such financial agent in a civil action for the loss of such funds unless such principal shows by evidence that such financial agent in selecting such depositary and making and continuing such deposit acted in bad faith or failed to exercise ordinary care and prudence, and the court instructs you as a matter of law that in this case the defendant, while treasurer of the West Chicago park commissioners, was their financial agent to make the funds which came to his custody bear interest, and whatever his criminal liabilities might be for a failure to turn over funds in his hands to his successor if the interest statute of 1893 had not been in force during his term of office, he cannot be held under the indictment in this case for a failure to turn over funds in his custody which came to his custody while such law of 1893 was in force, unless it is shown by the evidence that he converted the funds to his own use. (Refused.)

13. The court instructs the jury, as a matter of law, that there is no evidence in this case of any proper and legal demand having been made upon the defendant by his successor, Blount, to turn over the money of the West Chicago park commissioners in the hands of the defendant to said Blount. (Refused.)

14. If the jury believe from the evidence that the West Chicago park commissioners deposited their funds with the firm of E. S. Dreyer & Co., and kept their account with said firm, making deposits therewith, and in the course of carrying on said business made their checks directly thereon, then for the loss or failure to pay over funds thus deposited the defendant cannot be held liable, even though he was, at the time that the West Chicago park commissioners deposited such funds with E. S. Dreyer & Co., treasurer of the said West Chicago park commissioners. (Refused.)

665 15. The court instructs the jury that if they believe from the evidence in this case that the bank of E. S. Dreyer & Co. continued to receive deposits from its depositors up to the 19th day of December, 1896, that the presumption of the law is that the bank

of said E. S. Dreyer & Co. was and continued to be solvent as long as it received such deposits. (Refused.)

16. If the jury believe from the evidence, beyond all reasonable doubt, that the defendant, Dreyer, failed or refused to pay or deliver to Fred M. Blount what said Fred M. Blount demanded, as the treasurer of the West Chicago park commissioners, from said Dreyer, and that said Dreyer failed or refused to pay or deliver to said Fred M. Blount what was demanded by said Blount from said Dreyer, only because what was so demanded of said E. S. Dreyer by said Blount had been lost by reason of the failure of the banking-house of E. S. Dreyer & Co.; then the court instructs the jury that they should find the defendant not guilty, if from all the evidence in the case the jury have a reasonable doubt as to whether the defendant, Dreyer, could, by the exercise of ordinary care and prudence, have avoided such loss. (Refused.)

17. If the jury should believe from the evidence in this case that the failure or refusal of the defendant, E. S. Dreyer, to pay or deliver to Fred M. Blount what was demanded by Fred M. Blount, as treasurer of the West Chicago park commissioners, from said Dreyer, was occasioned by the failure of the banking-house of E. S. Dreyer & Co., on the 21st day of December, in the year 1896, then the court instructs the jury that they should find the defendant not guilty, unless the jury further believe from all the evidence, beyond a reasonable doubt,

666 that the banking-house of E. S. Dreyer & Co., as the depositary of the moneys and funds of the West Chicago park commissioners, was selected by the defendant, E. S. Dreyer, and that the defendant in selecting and keeping on deposit with said banking-house of E. S. Dreyer & Co. the moneys and funds of said West Chicago park commissioners did not exercise good faith and such reasonable and ordinary prudence as should be exercised by the treasurer of the West Chicago park commissioners in selecting a depositary for the moneys and funds of the West Chicago park commissioners. (Refused.)

18. The court instructs the jury that one of the essential ingredients of the crime charged in the indictment, which must be proved beyond a reasonable doubt, in order to warrant a conviction of the defendant, is that the failure or refusal of the defendant, E. S. Dreyer, to pay or deliver to Fred M. Blount what was demanded by said Fred M. Blount, as treasurer of the West Chicago park commissioners, from said Dreyer, was not occasioned by unavoidable loss or accident. (Refused.)

19. The court instructs the jury that the defendant E. S. Dreyer did not feloniously fail or refuse to pay or deliver to Fred M. Blount what was demanded by said Fred M. Blount as treasurer of the West Chicago park commissioners from said Dreyer unless it appears from all the evidence in the case said failure or refusal of said E. S. Dreyer was not occasioned by unavoidable loss or accident. (Refused.)

20. The jury are instructed, as a matter of law, that the defendant was subject in his control of the funds of the West Chicago park commissioners to the West Chicago park commissioners, and if the

jury find from the evidence that the West Chicago park com-
667 missioners caused their funds to be deposited with the firm of E. S. Dreyer & Co., instead of being delivered to the defendant, the defendant is not guilty of the offense charged by the indictment in this cause because of failure on his part to pay over as treasurer of said West Chicago park commissioners to his successor as such treasurer funds so deposited and lost by reason of the failure or suspension of the said E. S. Dreyer & Co., if the jury find that such funds were so lost. (Refused.)

The court instructs the jury that the defendant, E. S. Dreyer, did not feloniously fail or refuse to pay or deliver to Fred M. Blount what was demanded by said Fred M. Blount, as treasurer of the West Chicago park commissioners, from said Dreyer, unless it appears from all the evidence in the case said failure or refusal of said E. S. Dreyer was no- occasioned by unavoidable loss or accident. (Refused.)

668 The court further certifies that after the giving of said instructions upon February 28, 1900, the jury retired to consider their verdict in the manner and under the conditions hereinbefore certified to; that upon March 1st, 1900, the jury brought in the following verdict:

"We, the jury, find the defendant, Edward S. Dreyer, guilty of failure to pay over money to his successor in office in manner and form as charged in the indictment, and we fix the amount thereof to be $316,000, and we fix his punishment at imprisonment in the penitentiary."

To which said verdict said defendant, by his counsel, then and there excepted and made his motion for a new trial, which was entered of record; and afterwards, on March 10, 1900, said defendant filed his said motion in writing for a new trial, said motion for a new trial being as follows:

669 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS
vs.
EDWARD S. DREYER. } P. G. D, 54041.

Now comes said defendant, Edward S. Dreyer, and moves this honorable court for a new trial herein, and bases his said motion for a new trial upon the following grounds:

1. The verdict is contrary to the law.
2. The verdict is contrary to the instructions of the court.
3. The verdict is contrary to the evidence.
4. The verdict is not supported by the evidence.
5. The court erred in refusing to admit competent and relevant evidence offered by the defendant.
6. The court erred in excluding proper, competent, and relevant evidence offered by the defendant.

7. The court erred in giving each and all of the instructions to the jury requested by the People of the State of Illinois to be given.

8. The court erred in refusing each and all of the instructions requested by the defendant to be given and refused by the court.

9. The court erred in not giving to the jury each and every of the instructions requested by the defendant to be given.

10. The court erred in modifying the instructions requested by the defendant, which were modified and given, and in refusing to give the same as requested without modification.

11. The court erred in overruling the defendant's motion
670 to exclude the evidence and to instruct the jury to find the defendant not guilty.

12. The court erred in refusing and failing to instruct the jury, as requested, to find the defendant not guilty.

13. The court erred in overruling the defendant's motion to quash the indictment and each count thereof, and in not quashing the said indictment and each count thereof.

14. The verdict of the jury as rendered is informal and wholly insufficient to sustain final judgment and the sentence thereon.

15. The verdict is deficient and informal, in that it does not properly find the amount of the funds and property in question.

16. The verdict is deficient and contradictory, in that it does not properly fix the value of the property in question in lawful money of the United States.

17. The verdict is contrary to the evidence, in that the amount therein stated is in dollars, and the evidence is only as to certain checks and warrants whose value is not found by said verdict.

18. The court erred in permitting the attorney for the People in his arguments to the jury to use improper language toward the defendant and his attorneys.

19. The court erred in making improper remarks in the presence of the jury over the objection and exception of the defendant.

20. The verdict is deficient and informal in this, that the jury by said verdict has not said what time the defendant shall be confined in the penitentiary.

21. The verdict is deficient and informal in this, that the jury by said verdict has not found that the failure of the defendant to pay over funds to his successor, as found by said verdict, did not arise from and was not caused by unavoidable loss or accident.

671 22. There is no evidence to show that the failure of the defendant to pay over or deliver the funds and property mentioned in the indictment to his successor was not caused by unavoidable loss or accident, and the verdict should have so found.

23. The statute of Illinois known as "An act in relation to the sentence of persons convicted of crime, and providing for a system of parole, approved June 15, 1895, and in force July 1, 1895," under which the verdict was rendered, is opposed to and in contravention of the fifth amendment to the Constitution of the United States; which said fifth amendment is as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand

jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law, -or shall private property be taken for public use without just compensation."

24. The trial herein was not conducted according*ly* to due process of law, and the same and said verdict are contrary to due process of law and in contravention of the said fifth amendment to the Constitution of the United States and of the fourteenth amendment to said Constitution.

25. The said verdict imposes imprisonment on the defendant for debt, contrary to the provisions of the constitution of the State of Illinois.

26. There is a variance between the indictment and the verdict rendered herein in this, that the verdict does not find the defendant guilty of the crime charged in the indictment.

672 27. That when the jury retired to consider their verdict in said case no constable or other officer was sworn or affirmed to attend the jury in manner and form as provided by the statute of the State of Illinois.

28. When the jury retired to consider their verdict they were not in the custody or charge of a constable or other officer sworn as provided by the statute of the State of Illinois.

29. That the jury were allowed to separate before arriving at their verdict contrary, to the statute of the State of Illinois in such cases made and provided.

30. That the court erred in striking from the files the defendant's plea of former jeopardy.

31. That the court erred in not admitting in evidence the testimony of witnesses and the documentary evidence offered in support of the claim made by said defendant that he had been in former jeopardy.

32. The said trial and verdict were in other respects erroneous and contrary to law and the rights of the defendant.

EDWARD S. DREYER,
By MORAN, MAYER & MEYER,
His Attorneys.

The court further certifies that thereafter and on March 15th, 1900, said motion for a new trial was overruled; to which ruling defendant then and there excepted; that thereupon, on said March 15th, A. D. 1900, said defendant moved in arrest of judgment and filed his motion, in writing, in arrest of judgment; which said motion in arrest of judgment is in words and figures as follows:

673 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS } P. G. D., 54041.
vs.
EDWARD S. DREYER. }

Now comes said defendant, Edward S. Dreyer, and files this his motion in arrest of judgment, and as grounds of said motion states the following:

1. A new trial should have been granted herein for the reasons and each of them set forth in the motion for a new trial heretofore filed herein.

2. Because the said indictment herein and each count thereof are null and void.

3. Because the said indictment does not charge any offense cognizable by this court, or any public offense.

4. Because neither count of the said indictment charges any crime or offense against this defendant.

5. Because the alleged acts charged in and by each of the counts of the said indictment to have been done by this defendant do not constitute a crime or an offense cognizable by this court.

6. Because the alleged acts charged in and by each of the counts of the said indictment do not constitute and cannot be deemed or lawfully declared to constitute the crime of withholding funds from successor in office, or any other crime or offense.

7. Because it does not appear in and by either of the counts of the said indictment that the acts therein alleged to have been done by this defendant were done by him contrary to the statute mentioned in said indictment.

674 8. The statute of the State of Illinois entitled "An act to compel State, county, city, township, school, and park treasurers and other custodians of public funds to account for interest on such funds under their control," approved June 16, 1893, and in force July 1, 1893, relieved this defendant of any criminal liability under the statute mentioned in said indictment and made this defendant a mere debtor for the payment of the property, money, and funds in said indictment mentioned.

9. That it does not appear in and by the two counts of the said indictment or either of them that the alleged failure or refusal to pay or deliver over the property, funds, and money therein mentioned was not occasioned by unavoidable loss or accident.

10. That it appears in and by said indictment and each count thereof that at the time of the committing of the alleged offenses therein mentioned this defendant was still and had not ceased to be treasurer of the West Chicago park commissioners.

11. The acts and doings alleged and charged in and by the two counts of the said indictment do not constitute a crime and do not show or evidence any criminal intent or act on the part of this de-

fendant, and to constitute the same a crime or to punish this defendant therefor by fine or imprisonment or either or both, would deprive this defendant of liberty or property without due process of law, and to imprison this defendant for failure to pay over the property, funds, and money in said indictment mentioned would be to imprison this defendant for debt, contrary to the constitution of the State of Illinois.

12. Because the statute of the State of Illinois which is referred to in said indictment is void and unconstitutional and contrary to and in conflict with the Constitution of the United States, and especially the fourteenth amendment of and to the Constitution of the United States of America.

675 13. The acts and doings alleged and charged in and by each of the counts of the said indictment do not constitute a crime and do not show or evidence any criminal intent or act on the part of this defendant, and to constitute the same a crime or to punish this defendant therefor by fine or imprisonment, or either or both, would be depriving this defendant of liberty or property without due process of law, contrary to the Constitution of the United States, and particularly the fourteenth amendment of and to the Constitution of the United States of America.

14. Because this defendant has been in former jeopardy under the indictment herein.

15. Because there is still pending, undisposed of and indetermined, in the circuit court of Cook county, a certain action in debt instituted and maintained by the West Chicago park commissioners prior to the return of the said indictment, wherein and whereby the said West Chicago park commissioners seek to recover from this defendant as a debt the several sums of money and property mentioned in both counts of said indictment; that said action is general number 166,404 in said circuit court, and this defendant hereby makes profert of the record and files therein.

16. Because said West Chicago park commissioners have recovered a decree for said moneys mentioned in said indictment in the United States circuit court in and for the northern district of Illinois, northern division thereof, which decree was appealed from, but which decree was sustained by the United States circuit court of appeals in and for the seventh district on March 2, 1900, and in and by which said decree said West Chicago park commissioners will recover forthwith seventy per cent. of $347,000 on their said claim and the balance thereof within a very short time; and said defendant now here tenders the record in said case and offers to show each and every of the facts mentioned herein.

676 17. The statute of the State of Illinois referred to in said indictment denies to this defendant the equal protection of the laws, contrary to the fourteenth amendment of the Constitution of the United States.

18. Because the said indictment is contrary to law.

19. Because the said indictment is in other respects informal, insufficient, and uncertain.

20. The verdict of the jury is wholly informal and insufficient.

21. The verdict of the jury is insufficient and informal, in that it does not dispose of all the issues raised by the pleadings.

22. There is a variance between the indictment and the verdict rendered herein, in this, that the verdict does not find the defendant guilty of the crime charged in the indictment.

EDWARD S. DREYER,
By MORAN, MAYER & MEYER,
His Attorneys.

That thereupon said court denied said motion in arrest of judgment; to which ruling defendant then and there excepted.

And the court further certifies that the above and foregoing were all of the proceedings had or taken in said case, and that the instructions hereinbefore set forth were all of the instructions given in said case, and that the instructions identified as refused instructions herein were all of the instructions offered by said defendant and refused by said court.

677 Forasmuch, therefore, as the proceedings, matters, and things hereinbefore set forth do not fully appear of record, the defendant tenders this his bill of exceptions and asks that the same may be signed and sealed by the judge of said court pursuant to the statute in such case made and provided, which is accordingly done on this 19th day of March, 1900.

ARBA N. WATERMAN, [SEAL.]
Judge of the Circuit Court of Cook County and ex Officio Judge of the Criminal Court of Cook County.

Filed in the criminal court of Cook county Mar. 19, 1900.
PATRICK J. CAHILL, *Clerk.*

That on March 19th, A. D. 1900, there was filed in my office a certain stipulation in words and figures as follows, to wit:

678 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

PEOPLE OF THE STATE OF ILLINOIS } P. G. D., 54041.
vs.
EDWARD S. DREYER. }

It is hereby stipulated and agreed by and between Charles S. Deneen, State's attorney, for the People of the State of Illinois, and Moran, Mayer & Meyer, attorneys for said defendant, Edward S. Dreyer, and between the parties hereto, that the original bill of exceptions instead of a copy thereof may be incorporated in the transcript of the record herein in lieu of a copy of such bill of exceptions to be used upon writ of error.

CHARLES S. DENEEN,
State's Attorney.
MORAN, MAYER & MEYER,
Attorneys for said Defendant, Edward S. Dreyer.

March 6, 1900.

Filed in the criminal court of Cook county Mar. 19, 1900.
PATRICK J. CAHILL, *Clerk.*

679 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Patrick J. Cahill, clerk of the criminal court of Cook county, in said county and State, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record, together with original bill of exceptions incorporated by stipulation, in a certain cause lately pending in said court, wherein The People of the State of Illinois were plaintiffs and Edward S. Dreyer defendant.

Witness Patrick J. Cahill, clerk of said court, and the seal thereof, at Chicago, in said county, this 19th day of March, A. D. 1900.

[SEAL.] PATRICK J. CAHILL, *Clerk.*

680 In the Supreme Court of the State of Illinois.

EDWARD S. DREYER, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.

Assignments of Error.

First. The verdict is contrary to the law.

Second. The verdict is contrary to the instructions of the court.

Third. The verdict is contrary to the evidence.

Fourth. The verdict is not supported by the evidence.

Fifth. The court erred in refusing to admit competent and relevant evidence offered by the defendant.

Sixth. The court erred in excluding proper, competent and relevant evidence offered by the defendant.

Seventh. The court erred in giving each and all of the instructions to the jury requested by the People of the State of Illinois to be given.

681 Eighth. The court erred in refusing each and all of the instructions requested by the defendant to be given, and refused by the court.

Ninth. The court erred in not giving to the jury each and every of the instructions requested by the defendant to be given.

Tenth. The court erred in modifying the instructions requested by the defendant, which were modified and given, and in refusing to give the same as requested without modification.

Eleventh. The court erred in overruling the defendant's motion to exclude the evidence and to instruct the jury to find the defendant not guilty.

Twelfth. The court erred in refusing and failing to instruct the jury as requested to find the defendant not guilty.

Thirteenth. The court erred in overruling defendant's motion to quash the indictment and each count thereof, and in not quashing the said indictment and each count thereof.

Fourteenth. The verdict of the jury as rendered is informal and wholly insufficient to sustain final judgment and the sentence thereon.

Fifteenth. The verdict is deficient and informal, in that it does not properly find the value of the funds and property in question.

Sixteenth. The verdict is deficient and contradictory, in that it does not properly find the value of the property in question in lawful money of the United States.

Seventeenth. The verdict is contrary to the evidence, in
682 that the amount therein stated is in dollars, and the evidence is only as to certain checks and warrants whose value is not found by said verdict.

Eighteenth. The court erred in making improper remarks in the presence of the jury, over the objection and exception of the defendant.

Nineteenth. The verdict is deficient and informal in this, that the jury by said verdict has not said what time the defendant shall be confined in the penitentiary.

Twentieth. The verdict is deficient and informal in this, that the jury by said verdict has not found that the failure of the defendant to pay over funds to his successor as found by said verdict did arise from and was not caused by unavoidable loss or accident.

Twenty-first. The statute of Illinois, known as "An act in relation to the sentence of persons convicted of crime and providing for a system of parol, approved June 15, 1895, and in force July 1, 1895," under which the verdict is rendered, is opposed to and in contravention of the fifth amendment to the Constitution of the United States, which said fifth amendment is as follows:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law, -or shall private property be taken for public use without just compensation."

Twenty-second. The trial herein was not conducted according to due process of law, and the same and said verdict are con-
683 trary to due process of law and in contravention of the said fifth amendment to the Constitution of the United States and of the fourteenth amendment to said Constitution.

Twenty-third. The said verdict imposes imprisonment on the defendant for debt, contrary to the provisions of the constitution of the State of Illinois.

Twenty-fourth. There is a variance between the indictment and the verdict rendered herein in this: That the verdict does not find the defendant guilty of the crime charged in the indictment.

Twenty-fifth. The court erred in refusing to allow the jury to hear the evidence offered by the defendant in support of his plea of former jeopardy.

Twenty-sixth. The court erred in striking his plea of former jeopardy from the files.

Twenty-seventh. The court erred in not allowing the defendant to offer evidence before said jury tending to prove the former jeopardy of the defendant.

Twenty-eighth. The court erred in not instructing said jury to find said defendant not guilty, for the reason that said defendant had been once in jeopardy.

Twenty-ninth. The court erred in not discharging said defendant, he having once been in jeopardy.

Thirtieth. There was error in allowing said jury to retire in charge of officers not sworn, as provided by the statute of the State of Illinois.

Thirty-first. There was error in allowing said jury to retire in charge of unsworn officers, contrary to the statute of the State of Illinois.

Thirty-second. There was error in that when the jury re-
684 tired to consider their verdict in said cause, no constable or other officer was sworn or affirmed to attend the jury in manner and form as provided by the statute of the State of Illinois.

Thirty-third. There was error in that when the jury retired to consider their verdict in said cause they were not in the custody of a constable or other officer sworn as provided by the statute of the State of Illinois.

Thirty-fourth. There was error in that the jury were allowed to separate before arriving at their verdict, contrary to the statute of the State of Illinois in such case made and provided.

Thirty-fifth. The said trial and verdict were in other respects erroneous and contrary to law and the rights of the defendant.

Thirty-sixth. The court erred in overruling a motion for a new trial.

Thirty-seventh. The court erred in denying the motion in arrest of judgment.

Thirty-eighth. The judgment of the trial court upon the verdict is contrary to law.

Thirty-ninth. The judgment and sentence is informal and contrary to law.

Fortieth. There was error in that the court excluded the evidence as to the arrangement with the National Bank of Illinois to pay the moneys mentioned in said indictment to the West park board prior to December 19, 1896.

Forty-first. There was error in that the court excluded all evidence as to the West park board having recovered a judgment for this money based upon said arrangement.

Forty-second. There was error in that the court excluded
685 the evidence as to the judgment recovered by the West park board against said National Bank of Illinois for the moneys mentioned in said indictment.

Forty-third. The statute of Illinois known as, "An act to revise the law in relation to sentence and commitment of prisoners con-

victed of crime and providing for a system of parol and to provide compensation for the officers of said system of parol," approved April 21, 1899, under which the verdict in this case was rendered, and upon which verdict the judgment and commitment were rendered is opposed to and in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-fourth. The statute of Illinois known as, "An act in relation to the sentence of prisoners convicted of crime, and providing for a system of parol," approved June 15, 1895, in force July 1, 1895, under which the verdict in this case was rendered, and upon which verdict the judgment and commitment were rendered, is opposed to and in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-fifth. The statute of Illinois known as "An act to create a State board of pardons, and to regulate the manner of applying for pardons and commutations," approved June 5, 1897, and the amendment thereto under which the verdict in this case was rendered, and upon which verdict the judgment and commitment were rendered, is opposed to and in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-sixth. The commitment and sentence under which
686 the defendant is confined in the penitentiary is in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-seventh. Under said commitment and sentence said defendant is deprived of his liberty without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-eighth. The verdict of said jury was rendered under a law enacted in said State of Illinois which abridged the privileges and immunities of citizens of the United States, and deprives the defendant of liberty without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-ninth. The commitment and sentence of said defendant were rendered under a law enacted in said State of Illinois which abridges the privileges and immunities of citizens of the United States and deprives the defendant of liberty without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States.

And for other causes of error not herein specially set forth.

EDWARD S. DREYER,
By MORAN, MAYER & MAYER,
His Attorneys.

687 And afterwards, to wit, on the day and year last aforesaid, certain proceedings were had in said court in the words and figures following, viz:

EDWARD S. DREYER
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1378. Error to Criminal Court, Cook.

And now, on this day, comes the said plaintiff in error, by counsel, and moves the court that the writ of error herein be made a supersedeas and that the said plaintiff in error be admitted to bail pending such writ of error; which motion is by the court taken under advisement.

And afterwards, to wit, on the 14th day of April, A. D. 1900, the following proceedings were had in said court and entered of record, viz:

EDWARD S. DREYER
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1378. Error to Criminal Court, Cook.

And now, on this day, the court having duly *duly* considered the motion of said plaintiff in error for supersedeas and bail, and being fully advised of and concerning the premises—

It is considered and ordered by the court that said writ of error herein be made a supersedeas and as such be observed by all concerned; and it is further ordered by the court that said application for bail be denied.

And afterwards, to wit, on the 16th day of April, A. D. 1900, comes the said plaintiff in error and renews his application for bail, viz:

EDWARD S. DREYER
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1378. Error to Criminal Court, Cook.

And now comes the said plaintiff in error, by counsel, and again moves the court that he be admitted to bail pending the writ of error herein; which motion is by the court taken under advisement.

688 And afterwards, to wit, on the 17th day of April, A. D. 1900, the following proceedings were by the court had and entered of record, viz:

EDWARD S. DREYER
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1378. Error to Criminal Court, Cook.

And now, on this day, the court, having duly considered the motion of plaintiff in error for bail pending the writ of error herein and being fully advised of and concerning the premises, overrules and denies said motion.

689 And afterwards, to wit, on the 19th day of April, A. D. 1900, the following proceedings were had in said court and entered of record, viz:

EDWARD S. DREYER vs. THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1378. Error to Criminal Court, Cook.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that plaintiff in error hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said defendant in error having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court—

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

690 At a supreme court begun and held at Springfield, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred, within and for the State of Illinois.

Present: Carroll C. Boggs, chief justice; Alfred M. Craig, justice; Benjamin D. Magruder, justice; Jacob W. Wilkin, justice; Jesse J. Phillips, justice; Joseph N. Carter, justice; James H. Cartwright, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk*.

Be it remembered, to wit, on the nineteenth day of October, A. D. 1900, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

EDWARD S. DREYER v. THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1378. Error to Criminal Court, Cook.

And now, on this day, this cause having been argued by counsel and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error, therefore it is con-

sidered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said defendant in error recover of and from the said plaintiff in error their costs by them in this behalf expended, and that they have execution therefor.

691 At a supreme court begun and held at Springfield, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred, within and for the State of Illinois.

Present: Carroll C. Boggs, chief justice; Benjamin D. Magruder, justice; Jacob W. Wilkin, justice; Jesse J. Phillips, justice; Joseph N. Carter, justice; James H. Cartwright, justice; John P. Hand, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the 19th day of October, 1900, the opinion of the court was filed in the words and figures following, to wit:

EDWARD S. DREYER
vs.
PEOPLE STATE OF ILLINOIS. } No. 1378. Error to Crim. Ct., Cook.

692 Docket 1378, Ag. 68, Northern Div., June, 1900.

EDWARD S. DREYER
v.
THE PEOPLE.

Mr. Justice WILKIN delivered the opinion of the court:

This is a writ of error to the criminal court of Cook county to reverse a judgment of conviction against plaintiff in error, under section 215 of our Criminal Code. The indictment was to the February term, 1898, of that court, and consisted of one count. It charges that the defendant was, on and before December 21, 1896, treasurer of the West Chicago park commissioners, and authorized to collect, receive, safely keep and disburse the moneys, revenues, bonds, warrants and funds of said corporation, and that as such treasurer, prior to said December 21, 1896, he received of the funds of said park commissioners $316,013.40, which he had failed to pay over to Fred M. Blount, his successor in office, on the latter's demand. On July 26, 1899, counsel for the defendant moved to quash the indictment, but the motion was overruled and he entered his plea of not guilty. On August 29 he was regularly put upon trial, and on September 2 the following order was entered: "This day come the said People, by Charles S. Deneen, the State's attorney, and the said defendant, as well in his own proper person as by his counsel, also come, and also come the jurors of the jury aforesaid, who being now returned in court and being unable to agree upon a verdict are thereupon, by

order of this court, discharged from further consideration of this cause." February 19, 1900, he was again put upon trial, which resulted in this conviction.

It was not denied on the trial that $316,013.40 of the park commissioners' funds came into the hands of the defendant, as its treasurer, which he failed to pay over to his successor on demand, and the only defense attempted to be interposed was, that his failure to pay it over was the result of unavoidable loss or accident. The several grounds of reversal now urged by his counsel are as follows: The indictment is fatally defective; the plain requirement of the law was violated in placing the jury in charge of officers not sworn at the time or in the manner prescribed by statute; the defendant has once been tried for the same offense and the jury arbitrarily discharged when they were about to acquit the defendant; the trial judge admitted evidence not competent to prove the
693 crime charged and excluded evidence competent as a matter of defense; that statements were made by the trial court prejudicial to the defendant; that erroneous instructions were given on behalf of the People, and that the defendant's instructions were erroneously modified. We will consider these points in a somewhat different order from that in which they are stated in the briefs and argument.

The statute upon which the indictment was found provides that if certain officers having the custody of funds "shall fail or refuse to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over, or his agent or attorney, authorized in writing, he shall be imprisoned in the penitentiary not less than one nor more than ten years: Provided, such demand need not be made when, from the absence or fault of the offender, the same cannot conveniently be made: And, provided, that no person shall be committed to the penitentiary under this section, unless the money not paid over shall amount to $100, or if it appear that such failure or refusal is occasioned by unavoidable loss or accident." (Rev. Stat. 1874, p. 384.)

The only objection urged against the indictment under the motion to quash was, that it failed to negative the last proviso, namely: that it did not allege that the failure or refusal to pay over the money was not occasioned by unavoidable loss or accident. The rule as stated by this court is, that "where an act is made criminal, with exceptions embraced in the same clause of the statute which creates the offense, so as to be descriptive of the offense intended to be punished, it is necessary, in the indictment stating the act had been done, to negative the exceptions so as to show affirmatively the precise crime defined has been committed;" also, that "there are exceptions to this general rule, as, where the exception or proviso be in a subsequent clause of the statute, or if in the same section and not incorporated with the enacting clause by any apt words of reference, it is, in that case, a matter of defense and need not be negatived in the pleading." (Beasley *v.* People, 89 Ill., 571.) Counsel do not disagree as to this being a correct state-

ment of the law as laid down by the uniform current of authority, but it is insisted on behalf of plaintiff in error that the foregoing proviso is embraced in the same clause of the stat-
694 ute which creates the offense, is descriptive of the crime intended to be punished and is incorporated with the enacting clause, and therefore the indictment should have charged that the failure or refusal was not occasioned by unavoidable loss or accident. The plain language of the statute, in our opinion, refutes this position. The definition of the offense intended to be punished, and the penalty denounced against it, are clearly stated in a complete sentence, wholly independent of either of the succeeding provisos. Although they are in the same section, they are not "incorporated with the enacting clause by any apt words of reference." The language "if it appears," etc., clearly indicates an intention to allow an officer the benefit of such a defense, and not to require the State to allege and prove the negative. The construction insisted upon would practically destroy the efficacy of the law. It would be easy enough to make the allegation, but in many, if not most, cases, it would be impossible to make the negative proof. The motion to quash the indictment was properly overruled.

The next assigned error insisted upon is, that the court below refused to sustain the defense of former jeopardy. Conceding that the question was regularly raised on the trial, it was properly overruled. The plea was based upon the theory that by the discharge of the jury upon the first trial without the consent of the defendant he was entitled to be then acquitted, and could not be legally put upon trial a second time. As shown above, the jury was discharged for the reason that it was unable to agree. It had retired to consider of its verdict the day before, about five o'clock in the afternoon, and had remained out during the night and until half past nine in the forenoon.

The question for what causes the jury, in criminal trials, may be discharged before it has returned its verdict into court, the defendant not consenting, without the trial resulting as jeopardy in bar of another trial, has frequently arisen in the courts and the decisions thereon are not harmonious. It has never been passed upon by this court. It is true that by the common law, as well as by our statute, it is contemplated that when the jury retires it shall be kept together until a verdict is reached and returned into court; but it needs no reasoning to show that this theory of the law cannot always be
695 carried into effect without defeating justice, and it has long been the settled law that, without the consent of the prisoner, the court has the power to discharge a jury before verdict "from necessity," and to hold him for another trial. On this proposition the courts agree. The conflict has grown out of a difference of opinion as to what fact or circumstance should be deemed to constitute a necessity for such discharge. It has been held that the causes which create the necessity must fall under one of three heads, namely: (1) Where the court is compelled by law to be adjourned before the jury can agree upon a verdict; (2) where the prisoner by his own misconduct places it out of the power of the jury to investigate his

case correctly, thereby obtaining an unfair advantage of the State, or is himself, by the visitation of Providence, prevented from being able to attend to his trial; and (3) where there is no possibility for the jury to agree upon and return a verdict. The courts of a few States—principally Pennsylvania, Virginia, North Carolina and Tennessee—have held that the failure of a jury to agree merely because they cannot bring their several minds to the same conclusion is not an impossibility to agree within the meaning of the last-named class, but that the failure must result from some physical impossibility, such as the sickness or insanity of some one or more of the jurors; and, of course, such holding leads to the final conclusion, that in the absence of some necessity arising under the second class no discharge can be ordered for a mere failure to agree upon a verdict until the adjournment of the term at which the trial is had. The more prevalent doctrine, however, is thus stated by Archbold on Criminal Practice and Pleading (vol. 1, p. 593): "The general rule is, that the jury must be kept together from the time they are first charged with the prisoner or defendant until they deliver their verdict, unless the prisoner consents to their being discharged, or for causes occurring in which the judge, from necessity, is obliged to discharge them. If they cannot agree upon their verdict, and they appear not likely to do so, the judge, chairman or recorder, in the exercise of his discretion, may discharge them as soon as it becomes a matter of necessity, of which he is the judge, and he usually discharges them after they have been one night locked up in the jury-room, deliberating on their verdict." Also by Graham
696 & Waterman on New Trials (vol. 2, p. 122): "The discharge of a jury in a criminal case, without agreeing on a verdict, is a matter resting in the sound discretion of the court in which the trial is had."

The language of the Supreme Court of the United States, in United States *v.* Perez, 9 Wheat., 679, is as follows: "We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, if in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated. * * * We are aware that there is some diversity of opinion and practice on this subject in the American courts, but after weighing the question with due deliberation we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." And this, it can be safely said, is the consensus of opinion in all the courts of last resort throughout the Union in which the question has been raised, except in the four States named above, and possibly one or two others; and the courts of Pennsylvania and Virginia hold the same rule in cases not capital. Many of the cases are cited in *Ex parte* McLaughlin, 41 Cal., 211.

But, independently of the fact that by far the greater number of cases sustain the latter rule we are clearly of the opinion that it is more in consonance with reason and the procurement of just verdicts.

That wrong may result sometimes from the too hasty discharge of a jury is true; but to require the holding of a jury together from day to day, after they have had a reasonable time for deliberation and failed to return a verdict, and after the court is convinced that they will not agree except under duress of being confined until the end of the term, or longer (as might be done under our statute), would be little less impracticable and unreasonable, not to say absurd, than the old rule, which, in cases affecting life or member, forbade the discharge of the jury for any cause until it had returned a verdict. Every judge who has presided over criminal trials knows that cases are often submitted to juries upon which intelligent men cannot honestly avoid disagreement on the question of guilt or innocence.

To compel consent to a verdict under such circumstances,
697 under penalty of being confined for days, weeks or possibly months, would shock the sense of justice and often result in dishonest and unjust acquittals or convictions.

As to the point that the trial court erred in the admission and exclusion of evidence, it may be admitted that the prosecution was allowed to introduce evidence of facts not primarily material or necessary to a conviction, but we are unable to see how the defendant was in any way prejudiced by that testimony. The substantial ground of contention under this head is, that the court excluded competent testimony offered on behalf of the defendant. His counsel stated: "I want to prove that E. S. Dreyer & Co. kept their bank account with the National Bank of Illinois; that from time to time during the course of business, lasting through seventeen years and down to the time of its failure, Dreyer's bank account was overdrawn with the National Bank of Illinois; that to secure the National Bank of Illinois, Dreyer & Co. deposited collateral in the shape of securities, as well as the conveyance of large real-estate holdings to the bank; that that was upon the express agreement that the checks of Dreyer & Co. should always be paid; and that when it came to the taking of the West Park Board account, it was with the express understanding with Mr. Schneider and Mr. Hammond, vice-president and manager of the bank, that Dreyer having that security in their hands and having the West park account deposited with them, they would pay every check drawn on that fund. I also propose to prove that prior to the West Park Board account being in that bank in pursuance of that contract, the National Bank of Illinois advanced to Dreyer & Co. over $1,000,000, and that under this agreement that bank paid every check and draft of the West park board down to the time that the receiver thereof was appointed. I also propose to prove that, relying upon that agreement and acting under it, Dreyer continued his account in that bank, putting in the West park moneys with the entire account; that the National Bank of Illinois continued to perform the contract for which they had Dreyer's security, down to the day possession was taken (a receiver was appointed for the National Bank of Illinois); that the National Bank of Illinois had made the provision to pay these West park moneys and had the security

to do it." This offer, on objection by opposing counsel, was denied and an exception duly taken.

698 The offer amounted to no more than to show that, notwithstanding the defendant had placed the West park funds in the National Bank of Chicago with the general account of Dreyer & Co., which account was overdrawn, he had an agreement with said bank that it would pay all checks drawn by him, to an unlimited amount, for which he had given it security, and that if the bank had been allowed to continue business it would have, under that agreement, paid the money demanded of him. That the transaction offered to be proved would, on the part of the bank, have been contrary to the rules of safe banking we think must be admitted. Under such a method of doing business it was certainly to be expected that the result which followed would sooner or later take place, and on the part of the defendant the disposition of the funds was in direct violation of his duty as a public officer and contrary to good business rules. Anderson, in his Dictionary of Law, (p. 13,) defines "avoidable, unavoidable and inevitable accident" as follows: "Accidents are (1) such as are inevitable or absolutely unavoidable, because effected or influenced by the uncontrollable operation of nature; (2) such as result from human agency alone, but are 'unavoidable' under the circumstances; (3) such as are voidable because in a given case the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might, with reasonable care adapted to the emergency, have been avoided." That the loss resulting from the manner of doing business between the defendant and the National Bank of Illinois, as proposed to be shown, was an avoidable loss or accident, and not an unavoidable one, we think cannot be fairly questioned. It was not error to exclude the evidence.

We have considered the several points of objection to instructions given for the People, and the modification of some of those asked on behalf of the defendant, and find no reversible error in that regard. Neither do we think there is substantial ground for the contention that the presiding judge made statements in the presence of the jury prejudicial to the defendant. The remarks deemed prejudicial were made in ruling upon a question raised upon the trial, and we fail to discover in the language employed any-

699 thing, as is claimed, indicating an opinion that defendant was guilty of the charge made against him.

The point that upon the retirement of the jury to consider of their verdict a constable or other officer was not sworn or affirmed to attend them, remains to be considered.

Section 435 of the Criminal Code of this State (Rev. Stat., p. 411) is as follows: "When the jury retire to consider of their verdict in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted), unless by leave of the court, until they shall have agreed

upon their verdict, nor suffer others to speak to them, and that when they shall have agreed on their verdict he will return them into court: Provided, in cases of misdemeanor only, if the prosecutor for the people and the person on trial, by himself or counsel, shall agree, which agreement shall be entered upon the minutes of the court, to dispense with the attendance of an officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict so delivered to the clerk as the lawful verdict of such jury."

That it is reversible error, upon a criminal trial for a felony, to allow the jury to retire for the purpose of considering of their verdict without placing them in charge of a sworn officer, as required by this section, is not an open question in this court. In McIntyre *v.* People, 38 Ill., 514, it was said (p. 518): "The language of this section is explicit and peremptory in the requirement that the jury, when they retire to consider of their verdict, shall be placed in charge of a sworn officer. Nor is there any exception, only in cases of misdemeanors, where the parties, by agreement, may dispense with the requirement, and even in that case the agreement must not only be made, but the court is required to enter it upon its minutes. In the case of McKinney *v.* People, 2 Gilm., 540, this court said that in capital cases the law indisputably is, that from the commencement of the trial until the rendition of the verdict the jury, during all adjournments of the court, should be placed in charge of an officer, unless it is otherwise ordered by the court on the consent of the
700 accused and the attorney for the People." In Lewis *v.* People, 44 Ill., 452, after stating the foregoing section of the statute, it was again said (p. 454): "These provisions show the great care and solicitude of the General Assembly to secure to every person a fair and impartial trial; and it is eminently proper, as in many cases the accused is imprisoned and it is not in his power to protect his rights from being prejudiced by undue influences. It should ever be the care of courts of justice to guard human life and liberty against being sacrificed by public prejudice or excitement. The jury should be entirely free from all outside influences from the time they are empaneled until they return their verdict and it is accepted and they discharged, and the legislature have determined that the provisions of this statute are necessary to accomplish the object. It is a provision easily complied with, and one member of the court, at least, has never, in practice, seen it dispensed with except in cases of misdemeanor. The provisions of the statute are clear, explicit and peremptory. We know of no power, short of its repeal, to dispense with this requirement. In the case of McIntyre *v.* People, 38 Ill, 514, it was held to be error, in a case of felony, to omit to swear the officer having charge of the jury." Judgments of conviction were accordingly reversed in both of these cases because of a failure to comply with the requirment of the statute. The cor-

rectness of those decisions is recognized in the still later cases of Sanders *v.* People, 124 Ill., 218, and Farley *v.* People, 138 *id.* 97.

The point of controversy in the present case is not, however, whether it is reversible error to fail to comply with the statute, but whether the question is properly raised upon this record. No objection or exception was taken by the defendant, at the time of the retirement of the jury, that the officers in charge of it were not sworn, but the question was raised by him for the first time on his motion for new trial, one of the grounds of that motion being, "that when the jury retired to consider of their verdict in said case no constable or other officer was sworn or affirmed to attend the jury, in manner and form as provided by the statute of the State of Illinois." Affidavits and oral evidence were introduced upon the hearing of the motion in support of that ground, and counter-affidavits were filed by the People. The minute clerk of the court, one of the counsel for defendant and
701 a third party made affidavits, and the clerk testified upon the hearing, to the effect that the only oath administered to the bailiffs who had charge of the jury during the progress of the trial and upon their retirement was administered on the 20th day of February, when but four of the jurors had been accepted, and that the form of the oath was: "You and each of you do solemnly swear by the ever-living God that you will take care of this jury according to law; so help you God." Affidavits made by the bailiffs themselves, and by an assistant of the prosecuting attorney, who participated in the trial, tend to prove that the oath administered was in the statutory form; but these affidavits also show that the only oath administered to them was on the 21st day of February, immediately after the empaneling and swearing of the jury. It is shown by the bill of exceptions that the trial was not concluded and the jury finally sent out until February 28, so that even by the proof made on behalf of the People the only oath taken by the bailiffs was some six days prior to their retirement with the jury, and prior to the introduction of evidence and the subsequent steps of the trial. This cannot be held to be a compliance with the requirement of the statute that "when the jury shall retire to consider of their verdict," etc., "a constable or other officer shall be sworn," etc. To swear the bailiffs immediately upon the jury being sworn, and prior to the introduction of the evidence, the arguments of counsel and instructions of the court—six or seven days prior to the retirement of the jury to consider of their verdict—would be little less than farcical. Under such circumstances the oath would be meaningless and obedience to its obligations impossible. The holding in Sanders *v.* People, *supra*, gives no countenance to such a practice. There the trial was practically ended when the officer was sworn, and he took final charge of the jury under the obligations of that oath. Even that practice was not approved, but in view of the fact that but a short time intervened between the swearing of the officer and the retirement of the jury on the same day, and the officer being sworn in the statutory form, it was held not to be reversible error.

It is, however, insisted on behalf of the People that the record

shows such officers were sworn, and that being a part of the record it cannot be contradicted. This point is based upon the fact
702 that by a recital of the minute clerk in the proceedings of the trial it is stated: "February 28; and the jury heard further arguments of counsel and the instructions of the court, and retired in charge of sworn officers to consider of their verdict." On behalf of the plaintiff in error it is contended that this statement is no proper part of the record, and that, even if it should be so treated, it is consistent with the affidavits filed in support of the motion, and may properly be considered as having reference to the oath which the minute clerk swears was administered on February 20. Clearly, it is not a necessary part of the record, and we are inclined to the view that it should not be considered even a proper part of it, within the rule which precludes evidence tending to contradict a record. But so treating the record proper, it is silent as to when and how the officers were sworn, and the presumption must be that the court did its duty in that regard, until the contrary is made to appear. (McKinney *v.* People, 2 Gilm., 540.) And in this view it is insisted on the part of the People that the question cannot be properly raised for the first time on a motion for new trial. In support of the contention reliance is placed upon the well-understood rule that where a party seeks to question the regularity of a ruling of the court upon the trial of a case he must by timely objection call attention to the matter, and if his objection is overruled, preserve an exception to the ruling, otherwise it is waived. It is urged on behalf of the plaintiff in error that this rule is not applicable to the cause under consideration, where the alleged error is not in an erroneous ruling of the court, made upon a question raised upon the trial, but an omission to comply with a plain and positive requirement of the statute, and where the question is simply whether or not the statutory duty was performed.

The real questions to be determined here, we think, are whether the requirement of the statute is one which can be waived by the defendant by his consent; and if so, does the mere fact that he failed to object at the time amount to such consent or waiver? Under the more recent rules governing the trial of criminal cases the first of these questions must be answered in the affirmative. In Reins *v.* People, 30 Ill., 256, the indictment and conviction was for manslaughter. One of the errors assigned was, that the court had instructed the jury, by consent of the parties, to seal their verdict and separate, and meet the court the following day, when their ver-
703 dict would be opened and entered of record. It was insisted that under the foregoing section of the statute (which was then section 189) the crime charged against the defendant was but a misdemeanor, and therefore a separation by agreement was authorized by the last clause of that section. But the court, among other things, said (p. 273): "The question then arises, independent of any statute on the subject, when parties in a case not capital consent to such proceedings as are here shown, is the verdict vitiated?" And it was held that it was not, the court saying: "In capital cases even, where life is at stake, the separation of the jury without consent is not of

itself error and ground for a new trial. Something more must be shown. It must be shown that the accused might have been prejudiced by it." And it was further said: "The record recites, 'as the jury were about to retire to consider of their verdict it was suggested by the prosecuting attorney, as it was late in the day, the jury had better be allowed to seal their verdict, if they should agree before the court met on the following day, and disperse, and return their sealed verdict into court on the following day, to which proposition the defendant, by his counsel, assented, waiving all exceptions to such separation on the ground of irregularity, if the practice should be held irregular.' We are clear in our opinion that the verdict is not vitiated by this action of the court. No other rule could be adopted consistent with a proper, honest and efficient administration of the law. Where consent has been given, and even without it, and it is not shown improper influences have been exerted upon the jury during their separation, and no ground afforded for the suspicion of any such influences, it would be but trifling with the administration of the criminal law to listen and give weight to the objection. The statute has nothing to do with this case." And in McIntyre *v.* People, where it was urged and held that the omission to properly swear the officer retiring with the jury in conformity with the statute was error, it was said (p. 519): "The legislature has deemed this precaution essential to secure a fair and impartial trial, and it is a right secured to the accused, of which he cannot be deprived by the court or officers of the law; and if the requirement is omitted without his consent he may urge it for a reversal of a judgment of conviction." Numerous cases from this and other courts might be cited in support of the rule, but we deem it unnecessary to do so.

704 The more difficult question is whether the failure to urge an objection at the time amounts to consent or a waiver of compliance with the statute. In McKinney *v.* People, *supra*, it was said (p. 553): "The law in capital cases undoubtedly is, that from the commencement of the trial until the rendition of the verdict the jury, during all adjournments of the courts, should be placed in charge of an officer, unless it is otherwise ordered by the court, by the consent of the accused and the attorney for the People. * * * In this case, if the jury did separate without the consent of the prisoner it was an irregularity, and the court below would, upon the fact being established, have been bound to set aside the verdict and grant a new trial, unless such separation was the result of misapprehension, accident or mistake on the part of the jury, and under circumstances to show that such separation could by no possibility have resulted to the prejudice of the prisoner. The prisoner was in court with his counsel, and if the court had permitted the jury to disperse without the consent of the prisoner, such fact, being established by a bill of exceptions, would have been sufficient ground to reverse the judgment. As it is, this court is bound to infer, either that the court directed the jury to be kept together, or if they dispersed it was by consent. * * * A prisoner on trial, under our laws, has no right to stand by and suffer irregular proceedings to

take place and then ask to have the proceedings reversed, on error, on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglect in proper time to insist on his rights he waives them." In Holmes *v.* People, 5 Gilm., 478, the point that sworn officers did not accompany the jury upon their retirement was made, and it was said: "The record states that the jury retired to consider of their verdict, in charge of a sworn officer of the court, and the presumption is that the court performed its duty by requiring the proper oath to be administered. If the officer was not, in fact, sworn, the defendants should have objected to the irregularity at the time, and if not corrected by the court, have taken a bill of exceptions. McKinney *v.* People, 2 Gilm., 540." To the same effect are Atterbury *v.* State, 56 Ark., 515, State *v.* Frier,
705 118 Mo., 650, and United States *v.* Ball, 163 U. S., 662, cited by counsel for the People. See, also, People *v.* Johnson, 110 N. Y., 134.

The cases of McIntyre *v.* People, and Lewis *v.* People, *supra*, are authorities to the effect that the fact that the officer retiring with the jury was not sworn, in conformity with the statute, may be shown by affidavits heard on motion for new trial, embodied in the bill of exceptions; but the point whether the oath should be treated as waived because the record did not show an objection by the defendant at the time of the retirement, was not raised or decided in either of those cases. It is true that in the cases cited from other States the statutes involved were somewhat different from our own, but the principle decided is not materially affected by the distinction. The law making it the duty of the court to place the jury in charge of sworn officers is no more positive or imperative than the duty of seeing that the jury is kept together and not permitted to communicate with others, and we see no good reason for holding that the one requirement may not be waived by a failure to object, as well as the other.

It is therefore held that the question whether or not, upon the retirement of the jury to consider of its verdict, it was placed in charge of a constable or other officer sworn to attend it, as prescribed by statute, is not properly raised by the record, and therefore not available as error in this court.

The judgment of the criminal court will be affirmed.

Judgment affirmed.

Mr. Justice CARTWRIGHT:

I concur in affirming the judgment in this case and in the views expressed in the foregoing opinion, except as to the assignment of error based on the alleged fact that the jury was not placed in charge of an officer sworn according to law. Upon that question I have been unable to reconcile the holding of the opinion, that the fact the officer retiring with the jury was not sworn in conformity with the statute may be shown to the trial court by affidavits on a motion for a new trial and proved to this court in the same way; with the decision that the failure of the

defendant to object on account of such fact at the time the jury retired amounted to consent or waiver of his right. If it is necessary for a defendant to make an objection to the court at the time the jury retires that the law has not been complied with and the officer has not been sworn, the
706 court must rule on the objection and determine the fact whether the officer has been sworn. The statute is plain and peremptory and the ruling on the objection must depend solely upon the fact whether the oath has been administered or not. That question of fact must be decided upon what is before the court at the time and not from affidavits filed after the ruling on a motion for a new trial. If the fact that the officer was not sworn could be proved by affidavits at all, it must be proved then or the court could not be held in error in overruling the objection. If the objection is properly overruled, it seems manifest that the ruling could not be ground for a new trial, or become erroneous on account of affidavits subsequently presented to the court. I do not see how the two propositions can be harmonized.

The claim of plaintiff in error is that he has proved to the trial court and to this court that, by affidavits filed with his motion for a new trial, that an officer was not sworn to attend the jury upon their retirement, and that therefore the trial court erred in not granting such new trial. The judge of the criminal court, in making up and settling the bill of exceptions, did not find or recite that the officer was not sworn, and my concurrence in not sustaining the assignment based on that fact is on the ground that the fact cannot be proved by affidavits and made a part of the record in that way. It was the duty of the court to send a sworn officer with the jury, (McKinney *v.* People, 2 Gilm., 540), and if the duty was not performed it was the error of the court. It was as much the duty of the court as it was to have the defendant arraigned, the jury and witnesses sworn and the proceedings conducted according to law. The court might administer the oath or direct the clerk to do it, and necessarily whether it was done was within the knowledge of the court. The law presumes that the contrary appears, that the court performed the duty and that the officer was sworn according to the statute. (McKinney *v.* People, *supra;* Pate *v.* People, 3 Gilm., 644; Holmes *v.* People, 5 *id.*, 478; McIntyre *v.* People, 38 Ill., 514.) The alleged fact that the officer was not sworn can only be shown by a recital in the bill of exceptions, and if it does not appear in that way it cannot be considered. The office and purpose of a bill of exceptions is to recite and make a part of the record the events that transpire in the course of a trial. It must recite the facts out of which the question
707 of law arises and the ultimate decision what those facts are rests with the trial judge. "The law makes him, and properly so, the judge of the propriety and accuracy of the act he is called on to solemnly verify the truth of, so that it shall become a part of the record in the cause, and it is not for other parties to determine the truth." (People *v.* Pearson, 2 Scam., 189.) In Eastman *v.* People, 93 Ill., 112, the bill of exceptions failed to show an

exception to the ruling of the court and counsel claimed that the exception was in fact taken and a bill of exceptions was presented showing the fact, but the judge substituted another bill not showing the fact. The court said: "Assuming the statement of counsel to be true, is it not manifest that to act upon it would be a departure from all precedent and a palpable violation of duty on the part of the court? Can there be anything more thoroughly settled and universally understood, than that a court of review can only look at the record before it, and that in determining the rights of the parties thereto, must accept the record as an absolute verity? Even if the members of the court personally know a fact important to the rights of the parties, which by innocent mistake or fraudulent design has been omitted in making up the bill of exceptions, they would be powerless to act upon such knowledge. We must therefore conclusively presume in this as in all other cases, that the bill of exceptions speaks the facts as they really exist." In this case there is an omission of the alleged fact on which an assignment of error is based. The judge who settled the bill of exceptions heard affidavits as he might do, but did not find or recite the fact. A judge may examine notes and minutes, recall witnesses to be examined by him alone, and take all available means to determine the facts, but the question whether the bill fully and fairly presents the facts occurring in his presence is confided to his judgment and his decision is final. 3 Ency. of Pl. & Pr., 446, 447; Elliott's Appellate Procedure, sec. 798; Emerson *v.* Clark, 2 Scam., 489; Hoke *v.* Strubel, 121 Ill., 321; People *v.* Anthony, 129 *id.*, 218.

It is because of this established rule that, while mandamus will lie to compel a judge to settle a bill of exceptions, no court will direct what he shall put in it. He can only be required to sign such a bill as he believes recites the facts of the case, (*Ex parte* Bradstreet, 4 Peters, 102,) and affidavits of alleged facts are unavailing for that purpose. (2 Greene, 394.) The supreme court of Wisconsin refused to compel a judge to insert in a bill of exceptions an instruction which it was claimed he gave to the jury which he denied having given, although the instructions and exceptions thereto were reduced to writing by counsel at the trial and signed by the judge. This was on the ground that a judge can only be compelled to state the facts occurring at the trial according to his recollection. (State *v.* Noggle, 13 Wis., 380.) Facts cannot even be brought before a court of review by stipulation of the parties, where not recited in the bill of exceptions.

708

Following the rule that the judge must recite in the bill of exceptions what occurs on the trial, the court held in Mayes *v.* People, 106 Ill., 306, that the facts could not be shown by affidavit on a motion for a new trial. The attempt was to show in that way unwarranted statements by the State's attorney in his argument to the jury. The judge did not certify the fact of the statements being made. The court said, if the fact occurred it was to be presumed the judge knew it; that the affidavit of a defendant could not be made to override the recitals of the bill of exceptions as to what occurred upon the trial, and that the judge may have disregarded

the affidavit because he knew it to be untrue. In this case the judge knew whether he administered the oath or caused it to be done and did not need affidavits to bring it to his attention. He might hear affidavits in settling the bill of exceptions to aid his recollection and assist him in deciding as to the fact, but if they were unavailing to convince him they raise no question here. The failure of the judge to find and recite the fact is in effect a finding that it did not exist, and he may have disregarded the affidavits because he knew them to be untrue. The Mayes case was followed and the same ruling made in Scott *v.* People, 141 Ill., 195, and Peyton *v.* Village of Morgan Park, 172 *id.*, 102.

A party may be entitled to a new trial, not on account of any error of the court, but by reason of misconduct of a party or an officer or the jury out of court affecting the result of the trial, and in passing on a motion for a new trial on such a ground, the court must necessarily hear evidence as to the fact and decide from such evidence. A party may allege an exception to the ruling in such a case and have it reviewed, but has no such right as to facts within the knowledge of the court.

Mr. Chief Justice Boggs concurs in the separate opinion of Mr. Justice Cartwright.

709 STATE OF ILLINOIS, } ss:
Supreme Court, }

I, Christopher Mamer, elected clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said supreme court in the above-entitled cause of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Springfield, this third day of January, A. D. 1901.

C. MAMER,
Clerk of the Supreme Court.

710 At a supreme court begun and held at Springfield on Tuesday, the fourth day of December, in the year of our Lord one thousand nine hundred, within and for the State of Illinois.

Present: Carroll C. Boggs, chief justice; Benjamin D. Magruder, justice; Jacob W. Wilkin, justice; Jesse J. Phillips, justice; Joseph N. Carter, justice; James H. Cartwright, justice; John P. Hand, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

And be it remembered that afterwards, to wit, on the 4th day of December, A. D. 1900, the following proceedings were had in said court and entered of record, viz:

EDWARD S. DREYER
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1378. Error to Criminal Court, Cook.

And now, on this day, comes the said plaintiff in error, by counsel, and suggests a diminution of the record herein and moves the court for leave to file additional record instanter, which motion is taken under advisement by the court.

And afterwards, to wit, on the 7th day of December, A. D. 1900, the following proceedings were by said court had and entered of record, viz:

EDWARD S. DREYER
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1378. Error to Criminal Court, Cook.

And now, on this day, the court, having duly considered the motion of plaintiff in error for leave — file additional record herein instanter and being fully advised in the premises, overrules and denies said motion.

711 And afterwards, to wit, on the said 7th day of April, A. D. 1900, the following proceedings were by said court had and entered of record, viz:

EDWARD S. DREYER
vs.
THE PEOPLE OF THE STATE of Illinois. } No. 1378. Error to Criminal Court, Cook.

Now, on this day, this cause coming on to be heard upon the petition for rehearing herein, and the court being now duly advised in the premises, it is considered and ordered by the court that said petition for rehearing be overruled and denied.

And it is further considered by the court that said petitioner pay the costs and charges herein taxed.

712 And afterwards, to wit, on the 19th day of December, A. D. 1900, a petition for writ of error was filed in the office of the clerk of said court in the words and figures following, viz:

In the Supreme Court of Illinois, December Term, A. D. 1900.

EDWARD S. DREYER, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.

To the Honorable Carroll C. Boggs, chief justice of the supreme court of the State of Illinois:

Now comes your petitioner, Edward S. Dreyer, by Moran, Mayer & Meyer, his attorneys, and represents and states to the honorable chief justice of the supreme court of the State of Illinois that:

Said suit is a writ of error now pending in the supreme court of Illinois, wherein Edward S. Dreyer, petitioner herein, is plaintiff in error, and The People of the State of Illinois is defendant in error.

That in said suit a writ of error was sued out from this court to the criminal court of Cook county, to reverse a judgment of said criminal court entered on March 15, 1900, which said judgment sentenced said Edward S. Dreyer to the penitentiary for the crime of failure to pay over money to his successor in office, to be there held in custody until discharged by the State board of pardons, as authorized and directed by law, provided such term of imprisonment should not exceed the maximum term for the crime for which said Dreyer was convicted and sentenced.

That on October 19, 1900, this court affirmed the judgment of said criminal court of Cook county.

That within the time prescribed by the rules of this honorable court and on November 10, 1900, your petitioner filed his petition for a rehearing in this court from the opinion of October 19, 1900.

That on December 7, 1900, this honorable court denied said petition for rehearing.

That said supreme court of Illinois is the highest court of law or equity in said State of Illinois, in which a decision can be had in said suit, and in which court said final judgment was rendered against your petitioner, Edward S. Dreyer, as hereinbefore set forth, the record of which suit is now here presented to your honor, and from said record it will appear, and your petitioner represents and states the following:

1. That on the trial of said cause in said criminal court of Cook county and in the rendition of the judgment on said trial, and in the judgment of said supreme court upon the review of said judgment of said criminal court of Cook county, there was set up by your petitioner and drawn in question and decided adversely to your petitioner, that the trial of said suit in said criminal court of Cook county and the judgment therein rendered constituted a denial by said criminal court of Cook county, and by this honorable
713 court, of a privilege and immunity claimed under the fourteenth amendment to the Constitution of the United States.

2. That from the record of said suit, herewith presented to your honor, it will appear that your petitioner, Edward S. Dreyer, was twice placed in jeopardy for the same offense, contrary to the fourteenth amendment of the Constitution of the United States; that

that question was one of the questions passed upon in said criminal court of Cook county and by the honorable supreme court, and was decided adversely to your petitioner, and that that question is set up and preserved in the assignment of errors in this court, hereinafter more particularly set forth.

3. That from the record of said suit, it will appear that the officers in charge of the jury, when they retired to consider of their verdict, were not sworn in the manner, nor at the time prescribed by the statute of the State of Illinois, or by the common law, in contravention to the fourteenth amendment of the Constitution of the United States; that that question was one of the questions passed upon in said criminal court of Cook county and by the honorable supreme court, and was decided adversely to your petitioner, and that that question is set up and preserved in the assignment of errors in this court hereinafter more particularly set forth.

4. That from said record it will appear that the verdict of said jury in said criminal court of Cook county was rendered under a statute of the State of Illinois, known as "An act to revise the law in relation to sentence and commitment of persons convicted of crime, and providing for a system of parol, and to provide compensation for the officers of said system of parol," approved April 21, 1899. That there was set up and preserved in said record, and decided adversely to your petitioner, that said statute is in contravention to the fourteenth amendment of the Constitution of the United States, as will more fully appear from the assignment of errors hereinafter more particularly set forth.

5. That from said record it will appear that the verdict and judgment thereon was also based upon the statute of the State of Illinois known as "An act in relation to the sentence of persons convicted of crime and providing for a system of parol, approved June 15, 1895, and in force July 1, 1895;" that there was set up in said record and drawn in question and decided adversely to your petitioner that such statute was in contravention to the fourteenth amendment of the Constitution of the United States.

6. That from said record it will appear that the verdict and judgment thereon was also based upon the statute of the State of Illinois known as "An act to create a State board of pardons and to regulate the manner of applying for pardons and commutations, approved June 5, 1897, and the amendment thereto;" that there was set up in said record and drawn in question and decided adversely to your petitioner that such statute was in contravention to the fourteenth amendment of the Constitution of the United States.

7. That from said record it will appear that the judgment under which your petitioner is held, so rendered as aforesaid in said criminal court of Cook county, and reviewed by this honorable court and reaffirmed by this honorable court, deprives your petitioner of his liberty without due process of law and in contravention to the fourteenth amendment of the Constitution of the United
714 States, and that that question was set up in said record and drawn in question and decided adversely to your petitioner; that such question was properly preserved in said record, and that

each and every of said questions hereinbefore set forth are fully and properly set up and preserved in said record, as will more fully appear by the assignment of errors hereinafter set forth (as they appear in the record in said suit); such assignment of errors is as follows:

Twenty-second. The trial herein was not conducted according to due process of law, and the same and said verdict are contrary to due process of law and in contravention * * * of the fourteenth amendment to such Constitution.

Forty-third. The statute of Illinois known as "An act to revise the law in relation to sentence and commitment of prisoners convicted of crime and providing for a system of parol and to provide compensation for the officers of said system of parol," approved April 21, 1899, under which the verdict in this case was rendered, and upon which verdict the judgment and commitment were rendered, is opposed to and in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-fourth. The statute of Illinois known as "An act in relation to the sentence of prisoners convicted of crime, and providing for a system of parol," approved June 15, 1895, in force July 1, 1895, under which the verdict in this case was rendered, and upon which verdict the judgment and commitment were rendered, is opposed to and in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-fifth. The statute of Illinois known as "An act to create a State board of pardons, and to regulate the manner of applying for pardons and commutations," approved June 5, 1897, and the amendment thereto, under which the verdict in this case was rendered, and upon which verdict the judgment and commitment were rendered, is opposed to and in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-sixth. The commitment and sentence under which the defendant is confined in the penitentiary is in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-seventh. Under said commitment and sentence said defendant is deprived of his liberty without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-eighth. The verdict of said jury was rendered under a law enacted in said State of Illinois which abridged the privileges and immunities of citizens of the United States, and deprives the defendant of liberty without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States.

Forty-ninth. The commitment and sentence of said defendant were rendered under a law enacted in said State of Illinois which abridges the privileges and immunities of citizens of the United States and deprives the defendant of liberty without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States.

That as appears from such assignment of errors and the matters hereinbefore set forth, your petitioner, Edward S. Dreyer, is being deprived of his liberty without due process of law, and the judg-

ment of said criminal court of Cook county and of this honorable court denies to your petitioner the rights and privileges accorded to him by the Constitution of the United States and the amendment thereof, as hereinbefore referred to, all of which appears from the records and proceedings in said suit.

Wherefore, your petitioner, Edward S. Dreyer, prays for an allowance of a writ of error to the Supreme Court of the United States and for a stay of proceedings to be entered by the honorable chief justice of said supreme court of Illinois, until the record in said suit may be properly removed to the Supreme Court of the United
715 States and docketed therein, and until the error contained in the record thereof may be corrected.

MORAN, MAYER & MEYER,
Solicitors for Edward S. Dreyer.

The writ of error above applied for is hereby allowed to operate as a supersedeas, to remain as such supersedeas until such writ of error is disposed of by the Supreme Court of the United States.

CARROLL C. BOGGS,
Chief Justice of the Supreme Court of the State of Illinois.

716 STATE OF ILLINOIS, }
County of Cook, } *ss:*

In the Supreme Court of Illinois, Northern Grand Division.

EDWARD S. DREYER, Plaintiff in Error,
vs.
PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error.

Whereas an application has been made by the plaintiff in error for a writ of error to the Supreme Court of the United States; and

Whereas said writ of error has been allowed:

Now, therefore, we, the undersigned, do hereby enter ourselves security for all costs in this cause, and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in said action, either in this court or in the Supreme Court of the United States of America, either to the opposite party or to any of the officers of this court or of said Supreme Court of the United States, in pursuance of the laws of this State or in pursuance of the laws of said United States of America.

In witness whereof we have hereunto set our hands and seals this nineteenth day of December, A. D. 1900.

EDWARD S. DREYER. [SEAL.]
CHARLOTTE BILLIGMAN. [SEAL.]
MARY WALZ. [SEAL.]

STATE OF ILLINOIS, }
County of Cook, } *ss:*

717 *I*, Charlotte Billigman, being first duly sworn, upon oath deposes and says that she is a resident of the city of Chicago, county of Cook and State of Illinois; that she is the owner of sub-

lot four (4) of lots sixty-one (61) to ninety (90), in Bronson's addition to Chicago, known as 509 North Clark street, in said city of Chicago; that said property is worth twelve thousand dollars ($12,000) and is encumbered for four thousand dollars ($4,000) and is not a homestead.

That she is also the owner of sublot twelve (12), in lot fourteen (14), block twenty-one (21), in Canal Trustees' subdivision of section thirty-three (33), township forty (40) north, range fourteen (14) east, of the third principal meridian, known as number 16 Lincoln place, worth twelve thousand dollars ($12,000) and unencumbered, and is not a homestead.

That she is also the owner of lot fifteen (15), in block ten (10), Wolcott's addition, known as 92 Dearborn avenue, worth fourteen thousand dollars ($14,000), unencumbered, and not a homestead.

Affiant further says that she is worth, above all her just debts and liabilities, the sum of sixty thousand dollars ($60,000), and that she hereby tenders herself as surety upon the within bond.

CHARLOTTE BILLIGMAN.

Subscribed and sworn to before me this 19th day of December, A. D. 1900.

[Seal of Alfred S. Austrian, Notary Public, Cook County, Ill.]

ALFRED S. AUSTRIAN,
Notary Public.

STATE OF ILL., } ss:
Cook County, }

I, Marie Walz, first duly sworn, upon oath say that I am worth $15,000 in unencumbered real estate in Cook county, Ill.

MARY WALZ.

Subscribed and sworn to before me this 19th day of Dec., A. D. 1900.

[Seal of Alfred S. Austrian, Notary Public, Cook County, Ill.]

ALFRED S. AUSTRIAN,
Notary Public.

718 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Illinois, before you or some of you, being the highest court of equity of the said State in which a decision could be had in the said suit between Edward S. Dreyer, plaintiff in error, and The People of the State of Illinois, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an

authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Edward S. Dreyer, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected,

719 the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of December, in the year of our Lord one thousand nine hundred.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

JAMES T. JONES,
Clerk of the United States Circuit Court.

Allowed by—

CARROLL C. BOGGS,
Chief Justice of the Supreme Court of Illinois.

720 In the Supreme Court of the State of Illinois, Northern Grand Division.

EDWARD S. DREYER, Plaintiff in Error,
vs.
PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.

To the People of the State of Illinois, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court within thirty (30) days from the date hereof, at Washington, District of Columbia, pursuant to writ of error filed herein, wherein Edward S. Dreyer is plaintiff in error and People of the State of Illinois is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Carroll C. Boggs, chief justice supreme court of Illinois, this 19th day of December, A. D. 1900.

CARROLL C. BOGGS, [SEAL.]
Chief Justice of the Supreme Court of the State of Illinois.

721 STATE OF ILLINOIS, } ss:
Supreme Court, Northern Grand Division, }

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

I, Christopher Mamer, clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the petition, citation, & writ of error of the said supreme court in the above-entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Springfield, Dec. 22, A. D. 1900.

CHRISTOPHER MAMER,
Clerk of the Supreme Court.

721½ Service of the within petition, citation, and writ of error is accepted this 27th day of December, A. D. 1900.

CHARLES S. DENEEN,
For the People of the State of Illinois.

722 In the Supreme Court of Illinois.

EDWARD S. DREYER
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1378. Error to Criminal Court, Cook.

I, Christopher Mamer, clerk of the supreme court of Illinois, elected for the northern grand division of said State, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from one (1) to seven hundred and twenty-one (721), inclusive, contain a true and complete transcript and copy of the record and proceedings had in said court in the case which is above entitled, and of the whole thereof, including a certified copy of the opinion of the court, as the same remain of record and on file in my said office; also including the original writ of error and original citation, with acceptance of service thereof, copies of which said writ of error and citation have been lodged in my office, at Springfield, Illinois.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court to be thereunto affixed, at Springfield, this third day of January, in the year of our Lord one thousand nine hundred and one.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

723 In the Supreme Court of United States.

EDWARD S. DREYER, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.

Assignment of Errors.

And now comes Edward S. Dreyer, by Moran, Mayer & Meyer, his attorneys, and says that in the record and proceedings in the above-entitled cause there is manifest error in that:

First. The judgment of the criminal court of Cook county and of the supreme court of the State of Illinois deprives him of his liberty without due process of law, in contravention to the fourteenth amendment of the Constitution of the United States.

Second. That the trial of said suit was not conducted according to due process of law and that the verdict therein rendered and the judgment upon said verdict are contrary to due process of law and in contravention to the fourteenth amendment of the Constitution of the United States.

724 Third. That in and by said *said* trial and the verdict rendered therein and the judgment upon said verdict, he was twice placed in jeopardy for the same offense, in contravention to the fourteenth amendment of the Constitution of the United States.

Fourth. That the bailiffs in charge of the jury when they retired to consider their verdict on the trial in said cause were not sworn in the manner or form prescribed by the statutes of the State of Illinois, or the common law, and, therefore, he is deprived of his liberty without due process of law in contravention to the fourteenth amendment of the Constitution of the United States.

Fifth. The trial in said criminal court of Cook county was not conducted according to due process of law, and the same and said verdict are contrary to due process of law and in contravention to the fourteenth amendment of the Constitution of the United States.

Sixth. The statute of Illinois known as "An act to revise the law in relation to sentence and commitment of prisoners convicted of crime and providing for a system of parol and to provide compensation for the officers of said system of parol," approved April 21, 1899, under which the verdict in this case was rendered, and upon which verdict the judgment and commitment were entered, is opposed to and in contravention to the fourteenth amendment of the Constitution of the United States.

Seventh. The statute of Illinois known as "An act in relation to the sentence of prisoners convicted of crime, and providing for a system of parol," approved June 15, 1895, in force July 1, 1895, under which the verdict in this case was rendered, and upon which verdict the judgment and commitment were entered, is opposed to
725 and in contravention to the fourteenth amendment of the Constitution of the United States.

Eighth. The statute of Illinois known as "An act to create a State

board of pardons, and to regulate the manner of applying for pardons and commutations," approved June 5, 1897, and the amendment thereto, under which the verdict in this case was rendered, and upon which verdict the judgment and commitment were entered, is opposed to and in contravention to the fourteenth amendment of the Constitution of the United States.

Ninth. The commitment and sentence under which the defendant is confined in the penitentiary is in contravention to the fourteenth amendment of the Constitution of the United States.

Tenth. Under said commitment and sentence said defendant is deprived of his liberty without due process of law, in contravention to the fourteenth amendment of the Constitution of the United States.

Eleventh. The verdict of said jury was rendered under a law enacted in said State of Illinois which abridged the privileges and immunities of citizens of the United States, and deprives the defendant of liberty without due process of law, in contravention to the fourteenth amendment of the Constitution of the United States.

Twelfth. The commitment and sentence of said defendant were rendered under a law enacted in said State of Illinois which abridges the privileges and immunities of citizens of the United States and deprives the defendant of liberty without due process of law, in contravention to the fourteenth amendment of the Constitution of the United States.

EDWARD S. DREYER,
By MORAN, MAYER & MEYER,
His Attorneys.

Endorsed on cover: File No., 18,021. Illinois supreme court. Term No., 536. Edward S. Dreyer, plaintiff in error, *vs.* The People of the State of Illinois. Filed January 14th, 1901.

No. 232 37

Office Supreme Court U. S.
FILED
APR 11 1902
[illegible] Clerk.

Filed April, 1902.

Supreme Court of the United States.

October Term, A. D. 1902.

No. 232.

EDWARD A. SHEVES,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

BRIEF AND ARGUMENT IN BEHALF OF PLAINTIFF IN ERROR.

LEVY MAYER,
Attorney and Counsel for Plaintiff in Error.

[illegible]

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 336.

EDWARD S. DREYER,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error.

BRIEF AND ARGUMENT IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

*This is a writ of error to the Supreme Court of the State of Illinois. Plaintiff in error (**hereinafter referred to as defendant**) was indicted in the Criminal Court of Cook County, Illinois, under Section 215 of the Criminal Code of that state, which reads as follows:

"If any state, county, town, municipal or other officer or person who is or hereafter may be authorized by law to collect, receive, safely keep or disburse any money, revenue, bonds, mortgages, coupons, bank bills, notes,

*All numbers (—) refer to printed record.

warrants or dues or other funds or securities belonging to the state or any county, township, incorporated city, town or village, or any state institution, or any canal, turnpike, railroad, school or college fund or the fund of any public improvement that now is or may hereafter be authorized by law to be made, or any other fund now in being or that may hereafter be established by law for public purposes, or belonging to any insurance or any other company or person required or authorized by law to be placed in the keeping of any such officer or person, *shall fail or refuse, to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over*, or his agent or attorney, authorized in writing, he shall be imprisoned in the penitentiary not less than one nor more than ten years; Provided, such demand need not be made when, from the absence or fault of the offender the same cannot conveniently be made: *And provided, that no person shall be committed to the penitentiary under this section unless the money not paid over shall amount to one hundred dollars, or if it appears that such failure or refusal is occasioned by unavoidable loss or accident.* Every person convicted under the provisions of this section shall forever thereafter be ineligible and disqualified from holding any office of honor or profit in this state."

(Hurd's Revised Statutes, 1901, § 215.)

The indictment referred to (3) consists of but one count, and charges that up to December 21, 1896, defendant, Edward S. Dreyer, was treasurer of the West Park Commissioners, the same being a board of public park commissioners, appointed by the governor of the State of Illinois, and exercising powers of corporate authorities in the supervision of public parks and boulevards in the Town of West Chicago, Illinois, and being so duly appointed, qualified and acting as such treasurer of said West Park Commissioners, and duly authorized by law to collect and disburse moneys, bonds, etc., for the maintenance of public parks and boulevards in the Town

of West Chicago, during the time prior to the 21st day of December, 1896, while said defendant was so acting as such treasurer, a large amount of money, bonds, etc., amounting in all to, and of the value of $316,013.40, was placed in and came into his possession and custody as such treasurer. (4)

That one, Fred M. Blount was duly appointed and qualified as the successor of said Edward S. Dreyer as treasurer of said West Park Commissioners, on the said 21st day of December, A. D. 1896, and from said date, to the present time, has continued to be such treasurer as aforesaid. (4)

That on said 21st day of December, A. D. 1896, said defendant ceased to be such treasurer, and that thereupon the said Fred M. Blount became entitled to and was duly authorized by law to collect, receive and disburse the moneys, bonds, etc., for the maintenance of the public parks and boulevards in the Town of West Chicago, required and authorized by law to be placed in the hands and keeping of the said Fred M. Blount as successor as aforesaid of said Dreyer; that said defendant, on January 21, A. D. 1899, unlawfully, feloniously and willfully;

"Failed and refused to pay and deliver over to said Fred M. Blount as such acting treasurer, and as such successor in office, to-wit: treasurer of said West Chicago Park Commissioners * * * * the said large amount of moneys * * * the same then and there being the moneys for * * * maintenance of public parks and boulevards in the Town of West Chicago, * * * then and there amounting in all to and of the value of $316,013.40 * * * on demand therefor then and there duly made by the said Fred M. Blount as such acting treasurer. * * *" (5)

Immediately upon said case being called for trial the

defendant (by leave of court) filed his plea of former jeopardy. (9) Upon motion of the state's attorney that plea was stricken from the files. (10) (The court holding that the facts therein stated were matters of defense.)

The plea sets up that the defendant has once before been in jeopardy (for the same offense and under the same dictment), by reason of the fact that on August 29th, 1899, before the Hon. Judge Haneey, sitting in the Criminal Court of Cook County (the same forum), said case was called (23) and a jury was duly sworn and impanelled to try said defendant; that witnesses were sworn, who gave evidence on behalf of the People and the defendant, and the trial proceeded from day to day until September 1, 1899, upon which latter day, after arguments and instructions, the case was submitted to the jury. (23)

That at about the hour of 4 o'clock in the afternoon of said September 1, 1899, the jury retired to consider of their verdict; that at 4:55 o'clock in the afternoon the jury took a ballot upon the guilt or innocence of said defendant which resulted in a vote of six of said jurors voting to find the defendant guilty, and six of said jurors voting to find the defendant innocent; that four other ballots were taken between the hours of 4:55 o'clock P. M. and 9:45 o'clock P. M. of said September 1, 1899, each of which ballots resulted in the same vote. (24)

That from the latter hour until 8:50 A. M. (on September 2) a number of other ballots were taken by said jurors, which ballots resulted in five of said jurors voting for the guilt and seven of said jurors voting for the innocence of said defendant; that afterwards a number of other ballots were taken, resulting in four of said jurors voting in favor of the guilt

and eight of said jurors voting in favor of the innocence of said defendant; that thereupon a number of ballots were taken resulting in three of said jurors voting in favor of the guilt and nine of said jurors voting in favor of the innocence of said defendant. That at the hour of 9:30 A. M. on September 2, 1899 (said court having adjourned at the hour of 4:30 P. M. upon September 1, 1899), *said Judge Hanecy entered the court room* (where said trial was had) *and stated to defendant's attorneys that he had been informed that the jury had not agreed, and that he was going to discharge them.* (24)

The plea sets forth that the attorneys for said defendant then and there objected to the discharge of said jury. That notwithstanding said objection said court instructed the officer in charge of said jury to bring them into court, which was accordingly done. (24). That thereupon the court discharged said jury, and the defendant then and there again objected and excepted to such discharge for the reason that there was *no moral or physical necessity for the discharge of said jury* and that at the time of discharging said jury, *they were in good physical condition*, and the court did not discharge them by reason of any fatality or misconduct on the part of said jurors or anyone with reference to said jury, *or upon the request of said defendant or upon request of said jury, or any of them*, or for any other sufficient or legal cause, *or for the reason that there was any probability that said jury might not reach a verdict; and that at the time of such discharge said court did not have before it any sufficient or legal evidence as to how said jury stood*, or whether or not there was any probability of said jury reaching a verdict, and that by reason of the defendant being again called to answer said indictment and to stand

another trial thereunder, he will be and now is twice put in jeopardy for the same offense. (25)

Upon the discharge of said jury the court entered the following order:

"This day come the said People by Charles S. Deneen, the state's attorney, and said defendant, as well in his own proper person as by his counsel also come, and also come the jurors of the jury aforesaid, who being now returned in court, and being unable to agree upon a verdict, *are thereupon by order of this court, discharged from further consideration of this cause.*" (14)

To conform to the rulings of the lower court, the defendant (as a matter of defense on the trial) offered to make proof and did in the absence of the jury introduced evidence to sustain every allegation of the plea. (260,-272.)

To all of this evidence (with reference to the defendant's former jeopardy) the state interposed a demurrer, which the court sustained, and the defendant was not allowed to introduced this proof before the jury or argue the legal effect thereof to the jury. (270, 271.)

The plea having been disposed of and a motion to quash the indictment having been overruled, defendant was again put on trial under the indictment in question on February 19, 1900, before the Honorable Arba N. Waterman, holding a branch of the same Criminal Court of Cook County.

The trial (in which judgment was rendered, and from which judgment this writ of error is prosecuted) was begun before the said Honorable Arba N. Waterman on February 19, 1900 (15); upon that day both the People and the defendant proceeded to the selection of a jury.

On

February 19, 1900, no jurors were selected; "Bailiffs sworn."

February 20 (morning), 1900, four jurors were selected and sworn;

February 20 (afternoon), 1900, four jurors were selected and sworn;

February 21, 1900, four jurors were selected and sworn; thereby completing the panel of jurors to try the defendant. (Abst., 7.) "State claims. Bailiffs again sworn."

February 22, 1900, testimony taken;

February 23, 1900, further hearing of testimony.

February 24, 1900, further hearing of testimony.

Feb 25, 1900, Sunday intervened.

February 26, 1900, further hearing of testimony.

February 27, 1900, further hearing of testimony.

February 28, 1900, arguments of counsel and instruction of the court, and jury retired to consider of their verdict.

March 1, 1900, the jury returned their verdict of guilty. (19)

To the verdict thus rendered a motion for a new trial was interposed (352), assigning numerous grounds why a new trial should be allowed, among which grounds were the following:

"That when the jury retired to consider their verdict in said case no constable or other officer was sworn or affirmed to attend the jury in manner and form as provided by the statute of the State of Illinois."

"When the jury retired to consider their verdict they were not in the custody or charge of a constable or other officer sworn as provided by the statute of the State of Illinois." (354)

The above grounds were assigned upon the plain provision of the Illinois statute (Hurd's Revised Stat., §435) which reads as follows:

"*When the jury retire to consider their verdict,* in a criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted) unless by leave of court, *until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict, he will return them into court.* **Provided, in cases of misdemeanor only**, if the prosecutor for the people and the person on trial by himself or counsel *shall agree, which agreement shall be entered upon the minutes of the court,* to dispense with the attendance of any officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict so delivered to the clerk as the lawful verdict of such jury."

In support of such assignments for a new trial the defendant filed certain affidavits and introduced certain evidence, and the state filed certain counter-affidavits.

Upon the affidavits and evidence submitted upon the motion for a new trial with reference to this question, it was clearly established that the bailiffs in charge of the jurors from February 20 to March 1, were sworn but once, and that the oath was administered at the time the first four jurors were accepted and sworn (*morning of February* 20, 1900), and at no other time, and although it may be contended that the evidence disclosed that they were sworn a second time (when the jury were impanelled; that is, on February 21, 1900), there is no contention that the officers were sworn thereafter, although the jury did not retire to consider of their verdict until **seven** days after, February 21. And from the affidavits and evidence this court must conclude (as did the Supreme Court of the state

(371)) that the only oath administered to said bailiffs on February 20th (or 21st), and the only oath ever administered, was as follows:

"*You and each of you do solemnly swear by the ever living God that you will take care of this jury according to law, so help you God.*" (28, 30, 31.)

Which oath in no way complied with the mandatory provisions of Sec. 435 of the Criminal Code (Hurd's Revised Statutes of the Criminal Code.)

Upon March 1, 1900, the jury returned their verdict into court, which was:

"We, the jury, find the defendant, Edward S. Dreyer, guilty of **failure to pay over money** to his successor in office in manner and form as charged in the indictment, and we fix the amount thereof to be $316,000, and we fix his punishment at imprisonment in the penitentiary." (27)

To the verdict thus rendered a motion for a new trial was interposed and overruled as was also a motion in arrest of judgment. (20)

The court thereupon, on March 15, 1900, pronounced sentence and judgment against said defendant under which sentence and judgment, defendant is now imprisoned and which judgment is as follows:

"Therefore it is ordered and adjudged by the court that the said defendant, Edward S. Dreyer, be, and he hereby is, sentenced to the penitentiary of this state, at Joliet, for the crime of **failure to pay over money** to his successor in office, whereof he stands convicted; and it is further ordered and adjudged that the said defendant, Edward S. Dreyer, be taken from the bar of this court to the common jail of Cook County, and from thence by the sheriff of Cook County to the penitentiary of the State, at Joliet, and be delivered to the warden or keeper of said penitentiary; **and the said warden or keeper is hereby required and commanded to take the body of**

the said defendant, Edward S. Dreyer, and confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof, until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced.

It is further ordered that the said defendant pay all the costs of these proceedings, and that execution issue therefor." (21, 22.)

THE EVIDENCE.

The evidence taken upon the trial discloses that; on March 13, 1894, defendant was first elected treasurer of the West Chicago Park Commissioners for the ensuing year. (57)

On December 18, 1894, he was re-elected treasurer for the ensuing year. (58)

On December 30, 1895, he was re-elected treasurer for the ensuing year (59), and on December 21, 1896, the following action of the Park was recorded on the minutes of the commissioners:

"That inasmuch as checks drawn on the treasurer have been returned not paid, Resolved, that the resignation of Dreyer as treasurer be accepted, and the office declared vacant. Carried." (62)

The West Chicago Park Commissioners are a body corporate, organized under the special act of 1869 (1 Private Laws of Illinois, 1869, p. 343), entitled,

"An act to amend the charter of the City of Chicago to create a board of park commissioners, and authorize a tax in the Town of West Chicago, and for other purposes,"

and the amendments thereto.

By virtue of successive acts, authorizing large issues of bonds and empowering the board of park commissioners to increase the bond of the treasurer, Dreyer's bond was fixed at $500,000. (75)

The commissioners, pursuant to the authority of the provisions of the act of 1869, prescribed the duties of the treasurer as follows:

"Article 2. Committees. Section 1: There shall be a finance committee composed of three members. It shall have general supervision of the finances of the board, and shall pass upon the financial reports of all officers.

The treasurer shall act as financial agent of the board for the receipt and distribution of its funds. He shall keep the moneys paid to him for and on account of the board, *and the deposit account wherever kept, shall be in the name of the board.* He shall sign all checks drawn by him for account of the board. He shall see that the books of account are kept in proper form, and correctly, and will in all cases at once, upon his discovering any delinquencies in the account of any of the officers of the board, report the same in writing with the name of the delinquent to the board.

Section 2. He shall pay all orders signed by the secretary and countersigned by the auditor, and he shall pay no order that has not been so signed and countersigned.

Section 3. He shall cause all vouchers paid by him to be filed and properly preserved. He shall file with the secretary on or before the 5th day of each and ever month a detailed statement of the receipts and disbursements of the board for the preceding month, and his books and papers shall at all times be open to the inspection of any member of the board." (54, 55, 56.)

During the time Dreyer was treasurer of the West Park board there was in force in the State of Illinois an act, passed in 1893 (Session Laws of Illinois, 1893, p. 136), entitled:

"An act to compel state, county, city, township, school and park treasurers and other custodians of public

funds to account for interest on such funds, under their control."

This act provided:

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the state treasurer and every county, city, township, school and park treasurer, and every other custodian of public funds who shall be hereafter elected or appointed and qualified, *shall, at the end of each fiscal year,* **account for interest on the daily balances of the funds from time to time in his custody, at a rate of not less than two per cent. per annum, and as much higher as solvent banks that are reasonably accessible pay on the daily balances of accounts that are subject to sight draft or check.** *from time to time in his custody,* at a rate o*f not less than two per cent.* per annum, and *as much higher* as solvent banks that are reasonably accessible *pay on the daily balances of accounts that are subject to sight draft or check.* Three-fourths of such interest shall belong to the public and be added to the fund; and the remaining one-fourth of such interest shall belong to such treasurer or custodian, and may be retained by him as extra compensation for the extra care and responsibility assumed in making the fund bear interest; PROVIDED, that nothing herein contained shall be so construed as to in any way release such treasurer or custodian or his bondsmen from any liability. AND, PROVIDED, FUTHER, that if any such treasurer or custodian shall keep such funds or any part thereof in his personal possession *and not in a bank or on deposit for the purpose of receiving interest* on the same and keep the same in actual money and not in securities, *and shall not in any way use such funds or any part thereof himself* or receive any interest or thing of value or compensation for the use of said funds, or permit them to be used by any person, persons, copartnership or corporation, for his benefit, then he shall not be required to account for any interest on the funds so kept, providing no responsible depository accessible shall be willing to pay interest, and in that case he shall make, sign and file an affidavit in the following form: * * *."

For more than seventeen years prior to his becoming

treasurer, Dreyer was in the general banking and real estate brokerage business in the City of Chicago, in partnership with one Robert Berger, under the name of E. S. Dreyer & Co. (293) Their business was extensive and the business operations of the firm with their customers filled four immense customers' ledgers, which were exhibited to the jury upon the trial of said case. (126)

From the moment of Dreyer's first appointment, all funds of the West Park Commissioners were deposited with said firm of E. S. Dreyer & Co., in an account kept in the books of said bank under the title, "West Chicago Park Commissioners" (134); and none of said moneys ever went to the individual account or use of the defendant. (309)

The various deposits making up the money in question were made by the secretary of the board with E. S. Dreyer & Co., the secretary brought such deposits to Dreyer & Co.'s bank, with a deposit book entitled, "George F. Talty, Secretary, in account with bank of E. S. Dreyer &. Co." (178); and a deposit slip already prepared and entitled: "Deposited with E. S. Dreyer & Co., Bankers, corner of Washington and Dearborn streets, for account of West Chicago Park Commissioners."

In this way, from the time of defendant's first appointment up to December 21, 1896, there were deposited with E. S. Dreyer & Co. to that account various sums of money aggregating millions of dollars. (131, 132, 224, *et seq.*)

All of these moneys so deposited were properly paid out and accounted for during the entire period during which defendant was treasurer up to December 21, 1896, upon which day Dreyer was (admittedly) indebted

to the West Park Board for the balance of the various deposits in the sum of $316,013.40. (129)

Dreyer, during all the time he was treasurer, was under bonds to faithfully perform his duties and to account for all moneys which from time to time came into his hands as treasurer, each of which bonds were in the penal sum of $500,000. (74, 5.) There were three separate bonds given to cover his three terms of office; the last of which was given on January 14, 1896, and upon each of said bonds as surety appeared the name of George Schneider, among others. Mr. Schneider scheduled *over* $300,000 of property upon said bonds. (74) Mr. Schneider *was the father-in-law of Dreyer's partner,* Robert Berger. (296)

Mr. Schneider *was president of the National Bank of Illinois,* which was one of the most influential financial institutions in the City of Chicago, and its reputation "was at that time (December 21, 1896) as to solvency first-class. I never heard it questioned." (249, 250, 251 *et seq.*)

While Dreyer was treasurer, *Carl Moll was the president of the West Park Board and the cashier of the National Bank of Illinois.* (295, 296.)

During all the time Dreyer was treasurer, and for more than fifteen years prior thereto, all the moneys of E. S. Dreyer & Co., except a small amount of cash (for current use) was kept in the National Bank of Illinois (173, 4), and "*all the checks of the West Park Board were honored by the National Bank of Illinois, whether E. S. Dreyer & Co. were overdrawn or not. These payments* were in *large amounts. During the last ninety days we paid out over* $200,000 *for the West Park Board.*" (171)

The evidence disclosed that the

"*drafts of E. S. Dreyer & Co. were paid by the National Bank of Illinois at all times when the account of E. S. Dreyer & Co was overdrawn in the National Bank of Illinois, * * * and that continued until the National Bank of Illinois failed. The National Bank of Illinois had done this for seventeen years.*" (117, 171.)

Every dollar which had come into the hands of the treasurer or E. S. Dreyer & Co. from said West Park Board *was deposited in the National Bank of Illinois.* (170)

And to the extent of many hundreds of thousands of dollars the park moneys went direct to the National Bank of Illinois without ever passing through Dreyer & Co.'s bank at all except to credit the various sums to the West Park account on Dreyer & Co.'s books. (139)

The secretary of the West Park Board testified that the West Park Board received interest for the moneys in the hands of the treasurer for the year 1894 to the amount of $3,529.05; for the year 1895, $3,405.02; for the year 1896, $4,251.06 (being part of the moneys in question.) (100)

On December 21, 1896, under the order of the comptroller of the currency, a receiver was appointed of the National Bank of Illinois. (192) And at that time (defendant offered to prove that) there was over $3,000,000 in actual cash in the vaults of the National Bank of Illinois. (193) The failure of the National Bank of Illinois *caused the appointment of a receiver of E. S. Dreyer & Co* upon the same day. (309, 310.)

The entire transaction between Dreyer and the National Bank of Illinois with reference to the West Park moneys was under an agreement, which appears from Dreyer's testimony to be that:

The reason he turned over the West Park moneys to the National Bank of Illinois was because the president and vice-president of the National Bank of Illinois told him to do so, and that they would honor all E. S. Dreyer & Co.'s checks on the West Park Board. (305, 306.)

The facts disclose that this agreement was at all times fulfilled and extended over a period of many years. (307)

The trial court would not permit the defendant to prove that the National Bank of Illinois had securities for and had agreed to pay over the West Park moneys whenever called for or payable, which was in law and in fact the same as if that money had actually been to the credit of E. S. Dreyer & Co.; and would not permit the defendant to show that the National Bank of Illinois had ten times the amount of money in question, in actual cash, in its vaults, and was therefore entirely capable of fulfilling its agreement to pay over this money; and that through no fault of Dreyer's a receiver was appointed by the comptroller of currency to take possession of all the assets, property and effects of the National Bank of Illinois. And had this not occurred the moneys would have been forthcoming to the West Park Board at the time the same were due and payable, *and they were payable nine days after the failure as Dreyer's term then expired* (58), or when demanded of the treasurer. These facts were embodied in the following offer tendered but refused:

"I want to prove that E. S. Dreyer & Co. kept their bank account with the National Bank of Illinois; that from time to time during the course of business, lasting through seventeen years and down to the time of its failure, Dreyer's bank account was overdrawn with the National Bank of Illinois; that to secure the National Bank of Illinois, Dreyer & Co. deposited collateral in the shape

of securities as well as the conveyance of large real estate holdings, to the bank; that that was upon the express agreement that the checks of Dreyer & Co. should always be paid; *and that when it came to the taking of the West Park Board account it was with the express understanding with Mr. Schneider and Mr. Hammond, vice-president and manager of the bank, that Dreyer having that security in their hands and having the West Park account deposited with them, they would pay every check drawn on that fund.* I also propose to prove that prior to the West Park Board account being in that bank in pursuance of that contract the National Bank of Illinois advanced to Dreyer & Co. over $1,000,000, and that under this agreement that bank paid every check and draft of the West Park Board down to the time that the receiver thereof was appointed. I also propose to prove that relying upon that agreement and acting under it Dreyer continued his account in that bank, putting in the West Park moneys with the entire account; that the National Bank of Illinois continued to perform the contract for which they had Dreyer's security down to the day possession was taken (a receiver was appointed for the National Bank of Illinois); *that the National Bank of Illinois had made the provision to pay these West Park moneys and had the security to do it.*" (297, 298.)

The demand for this money was made by Fred M. Blount on January 31, 1900 (114), more than three years after the failure of Dreyer & Co. and the National Bank of Illinois, and after the West Park Board had obtained a decree for these very moneys, based upon this very agreement and arrangement, which the court refused to allow the defendant to make proof of, and which decree the court would not admit in evidence (237), although the moneys were at the time of Dreyer's conviction set aside to pay that decree (294) and have long since been paid.

ERRORS RELIED UPON.

The errors assigned and relied upon in this court are the following:

"1. That on the trial of said cause in said criminal Court of Cook County and in the rendition of the judgment on said trial, and in the judgment of said Supreme Court upon the review of said judgment of said Criminal Court of Cook County, there was set up by your petitioner and drawn in question and decided adversely to your petitioner, that the trial of said suit in said Criminal Court of Cook County and the judgment therein rendered constituted a denial by said Criminal Court of Cook County, and by this honorable court, of a privilege and immunity claimed under the fourteenth amendment to the Constitution of the United States.

2. That from the record of said suit, herewith presented to your Honor, it will appear that your petitioner, Edward S. Dreyer, was twice placed in jeopardy for the same offense, contrary to the fourteenth amendment of the Constitution of the United States; that (379) that question was one of the questions passed upon in said Criminal Court of Cook County and by the Honorable Supreme Court, and was decided adversely to your petitioner, and that that question is set up and preserved in the assignment of errors in this court, hereinafter more particularly set forth.

3. That from the record of said suit, it will appear that the officers in charge of the jury, when they retired to consider of their verdict, were not sworn in the manner, nor at the time prescribed by the statute of the State of Illinois, or by the common law, in contravention to the fourteenth amendment of the Constitution of the United States; that that question was one of the questions passed upon in said Criminal Court of Cook County and by the Honorable Supreme Court, and was decided adversely to your petitioner, and that that question is set up and preserved in the assignment of errors in this court hereinafter more particularly set forth.

4. That from said record it will appear that the verdict of said jury in said Criminal Court of Cook County

was rendered under a statute of the State of Illinois, known as 'An Act to revise the law in relation to sentence and commitment of persons convicted of crime, and providing for a system of parol and to provide compensation for the officers of said system of parol,' approved April 21, 1899. That there was set up and preserved in said record, and decided adversely to your petitioner, that said statute is in contravention to the fourteenth amendment of the Constitution of the United States, as will more fully appear from the assignment of errors hereinafter more particularly set forth.

5. That from said record it will appear that the verdict and judgment thereon was also based upon the statute of the State of Illinois known as 'An Act in relation to the sentence of persons convicted of crime and providing for a system of parol, approved June 15, 1895, and in force July 1, 1895;' that there was set up in said record and drawn in question and decided adversely to your petitioner that such statute was in contravention to the fourteenth amendment to the Constitution of the United States.

6. That from said record it will appear that the verdict and judgment thereon was also based upon the statute of the State of Illinois known as 'An Act to create a state board of pardons and to regulate the manner of applying for pardons and commutations, approved June 5, 1897, and the amendment thereto;' that there was set up in said record and drawn in question and decided adversely to your petitioner that such statute was in contravention to the fourteenth amendment of the Constitution of the United States.

7. That from said record it will appear that the judgment under which your petitioner is held, so rendered as aforesaid in said Criminal Court of Cook County, and reviewed by this honorable court and reaffirmed by this honorable court, deprives your petitioner of his liberty without due process of law, and in contravention to the fourteenth amendment of the Constitution of the United States, and that that question was set up in said record and drawn in question and decided adversely to your petitioner; that such question was properly preserved in said record, and that (380) each and every of said questions hereinbefore set forth are fully and properly set up and preserved in said record. * * *" (381.)

BRIEF AND ARGUMENT.

Under such assignments of errors, three questions are before this court for its consideration.

I.

THE OMISSION TO SWEAR THE BAILIFFS IN THE MANNER PRESCRIBED BY THE COMMON LAW AND THE STATUTES OF THE STATE OF ILLINOIS BEFORE THE JURY RETIRED TO CONSIDER OF THEIR VERDICT.

II.

THE DISCHARGE OF THE JURY ON THE FIRST TRIAL UNDER THE CIRCUMSTANCES IN THE CASE AT BAR.

III.

THE JUDGMENT OF THE CRIMINAL COURT OF COOK COUNTY, DIRECTING "THE WARDEN OR KEEPER OF SAID PENITENTIARY * * * TO TAKE THE BODY OF SAID DEFENDANT AND CONFINE HIM IN SAID PENITENTIARY * * * UNTIL DISCHARGED BY THE STATE BOARD OF PARDONS, AS AUTHORIZED AND DIRECTED BY LAW, PROVIDED SUCH TERM OF IMPRISONMENT IN SAID PENITENTIARY SHALL NOT EXCEED THE MAXIMUM TERM FOR THE CRIME FOR WHICH SAID DEFFENDANT WAS CONVICTED AND SENTENCED."

I.

THE OMISSION TO SWEAR THE BAILIFFS IN THE MANNER PRESCRIBED BY THE COMMON LAW AND THE STATUTES OF THE STATE OF ILLINOIS BEFORE THE JURY RETIRED TO CONSIDER OF THEIR VERDICT.

Section 5 of article2 (Bill of Rights) of the Constitution of the State of Illinois, of 1870, provides:

"The right of trial by jury, as heretofore enjoyed, shall remain inviolate. * * *"

(Hurd's Rev. St. of Ill., p. 54.)

Section 6 of article 3 (Declaration of Rights) of the constitution of 1848, provides that:

"The right of trial by jury shall remain inviolate."

(Hurd's Rev. St. of Ill., p. 50.)

Section 6 of article 8 of the constitution of 1818 provides that:

"The right of trial by jury shall remain inviolate."

(Hurd's Rev. St. of Ill., p. 35.)

Section 8 of the Criminal Code of Illinois provides:

"All trials for criminal offenses shall be conducted according to the course of the common law, except where this act points out a different mode. * * *"

(Hurd's Rev. St. of Ill., p. 659.)

Section 1 of chapter 28 of the Statutes of the State of Illinois provides:

"That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of and to supply the defects of the common law

prior to the fourth year of James the First * * * and which are of a general nature and not local to that kingdom, shall be the rule of decision and shall be considered as of force until repealed by legislative authority."

(Hurd's Rev. St. of Ill., p. 418.)

The Supreme Court of the State of Illinois has defined the term, "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," in the following manner:

"By the clauses of the constitution above cited the common law right to a trial by the jury in criminal cases is guaranteed and declared to be inviolate, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded. It is, however, said that the words '*as heretofore enjoyed*' *relate to those enjoyed at the time of the adoption of the constitution of* 1870. * * * The word '*heretofore*' as used evidently relates to the past, and in order to determine the true meaning of the words 'the right of trial by juries as heretofore enjoyed' *it is necessary to go back to the common law of England.* When this is done it will be found that the right of trial by jury constitutes certain specific things which cannot be dispensed with or disregarded on the trial of a person charged with a felony. * * * *If the language 'the right of trial by jury as heretofore enjoyed shall remain inviolate' shall be construed to mean that the system of trial by jury as it existed by statute at the time the constitution of* 1870 *was adopted was engrafted on and became a part of the constitution, as is contended, many embarrassing results never contemplated would follow.*"

George v. *People*, 167 Ill., 447.

Also in

Harris v. *People*, 128 Ill., 585.

Section 435 of the Criminal Code provides that:

"*When the jury retire to consider of their verdict,* in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted) unless by leave of court, *until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict, he will return them into court. Provided, in cases of misdemeanor only,* if the prosecutor for the people and the person on trial by himself or counsel *shall agree, which agreement shall be entered upon the minutes of the court,* to dispense with the attendance of any officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict so delivered to the clerk as the lawful verdict of such jury."

That this section of the Criminal Code was plainly violated in the case at bar, and also the practice and procedure of the common law is indisputable.

The effect of the omission to swear the bailiffs, as provided by the Statute of the State of Illinois, its constitution and the common law, has been frequently passed upon in the courts of Illinois.

In *Jackson* v. *The People*, 36 Ill. App., 88, plaintiff in error was indicted for selling intoxicating liquors in less quantity than five gallons (a misdemeanor), in violation of the statute The question arose as to the legal effect of omitting to swear the officers placed in charge of the jury when they retired to consider their verdict. The jury having found the defendant guilty, the case was taken to the Appellate Court for the Fourth District. In passing upon the question the court said:

"The officer who was placed in charge of the jury when they retired to make up their verdict was not sworn as the statute requires. *This requirement of the statute cannot be dispensed with, even in misdemeanors, except by an agreement noted upon the minutes of the court.* See Sec. 495, Chap. 38, Starr & C. Stats. Ill., 866. *If it should be shown that no injurious results of this omission followed to the defendant, this will not cure the error.* **It was no part of the duty of the defendant to see that the officer was sworn, or to object to his taking charge of the jury until he was sworn.** It was the duty of the people to see that this was done, or that it was waived by an agreement entered on minutes of the court. The provision of the statute is clear, explicit and peremptory, and, until modified or repealed, its requirement cannot be dispensed with. *McIntyre* v. *People*, 38 Ill., 514; *Lewis* v. *People*, 44 Ill., 452."

In *McIntyre* v. *People*, 38 Ill., 514, an indictment for murder was found against the plaintiff in error. Before the retirement of the jury (which was in the evening), the officer in charge of the jury was not sworn, "otherwise *than at the noon adjournment on the same day* he had been sworn to keep the jury together under the order of the court." One of the grounds assigned for error in the Supreme Court (the defendant having been found guilty) was that "the court erred in placing the jury, while deliberating, in charge of an officer *not sworn in accordance with the statute.*" In passing upon that question the court said:

"We only propose in this case to determine whether the court below should have granted a new trial, *not on the evidence*, but alleged irregularities in the trial. The first question presented by the assignment of error is, *that the court below should have placed the jury in charge of a sworn officer of the court when they retired to deliberate upon their verdict.*

The 189th section of chapter entitled 'Criminal Jurisprudence' (R. S., 186) declares that 'when the jury shall retire to consider their verdict, in any criminal case

a constable or other officer shall be sworn or affirmed to attend the jury to some private, convenient place, and to the best of his ability keep them together, without meat or drink, water excepted, unless by leave of the court, until they shall have agreed upon their verdict; nor suffer others to speak to them, and that when they shall have agreed on their verdict, he will return them into court.' A subsequent clause, in the same section, provides that in case of misdemeanors, the prosecutor for the People and the person on trial, by himself or counsel, may agree, which agreement shall be entered on the minutes of the court, that the jury may reduce their verdict to writing and disperse upon delivering it, sealed up, to the clerk, and may also agree to dispense with the attendance of a sworn officer; and declares that the court may carry such agreement into effect and receive the verdict thus found.

The language of this section is explicit and peremptory, in the requirement that the jury when they retire to consider of their verdict shall be placed in charge of a sworn officer. **Nor, is there any exception, excepting in case of misdemeanor, where the parties, by agreement, may dispense with the requirement, and even in that case the agreement must not only be made but the court is required to enter it upon its minutes.** In the case of *Kinney* v. *The People*, 2 Gilm., 540, the court said that in capital cases the law indisputably is, that from (519) the commencement of the trial until the rendition of the verdict, the jury during all adjournments of the court should be placed in charge of an officer, unless it is otherwise ordered by the court on the consent of the accused and the attorney for the People.

The court in that case also say that it is not necessary that the record should show that an officer was sworn to take charge of the jury, but that it is the duty of the court to send a sworn officer of the jury, and if this duty is neglected, such facts should appear from a bill of exceptions. In this case it appears from the evidence embodied in the bill of exceptions that the officer having charge of the jury, at the time they retired to consider of their verdict, was not sworn. *It, however, appears that on an adjournment of the court at a previous time in the progress of the trial, the officer was sworn and charged by the court, but*

the oath required by the statute was not administered. The legislature has deemed this precaution essential to secure a fair and impartial trial; and it is a right secured to the accused, of *which he cannot be deprived by the court* or officers of the law. **And if the requirement is omitted without his consent, he may urge it for a reversal of a judgment of conviction.**
out his consent, he may urge it for a reversal of a judgment of conviction."

In *Lewis* v. *People*, 44 Ill., 452, the identical question was there again raised. It appears in that case from the statement of facts that "*defendant entered a motion for a new trial for the reason, among others, that the officer taking charge of the jury was not sworn as required by the statute. This ground was supported by affidavit of its truth.*" The court overruled the motion for a new trial and rendered judgment and sentenced the defendant to the penitentiary for four years. In passing upon the question the Court said:

"A motion was entered for a new trial, upon the ground, among others, that the jury, when trying the case, after hearing the evidence, retired to consider of their verdict, in charge of an officer who was not sworn *in the mode prescribed by the statute.* The motion was overruled and a judgment rendered on the verdict. The record discloses the fact that the officer in whose charge the jury were placed while deliberating on their verdict was not sworn, and this is the only error relied upon for a reversal.

The 189th section of the Criminal Code, R. S., 186, declares that, 'When the jury shall retire to consider of their verdict, in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and, to the best of his ability, keep them together without meat or drink (water excepted), unless by leave of the court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court.'

But it declares that, **in case of misdemeanor only,** if the prosecutor for the People and the accused shall by himself or counsel agree, which agreement shall be entered upon the minutes of the court, they may dispense with the attendance of an officer upon the jury.

The next section declares that if any officer sworn to attend upon a jury shall knowingly violate his oath or affirmation, or shall so negligently perform his duties that the jury shall separate without leave of the court, or obtain food or drink (except water), or if any person not belonging to the jury shall hold conversation with any of the jury, every person and officer so offending shall be punished for contempt of court by fine or imprisonment, or both, in the discretion of the court.

These provisions show the great care and solicitude of the General Assembly to secure to every person a fair and impartial trial; and it is eminently proper, as in many cases the accused is imprisoned, and it is not in his power to protect his rights from being prejudiced by undue influences. It should ever be the care of courts of justice to guard human life and liberty against being sacrificed by public prejudice or excitement.

The jury should be entirely free from all outside influences from the time they are impaneled until they return their verdict and it is accepted and they discharged; *and the legislature have determined that the provisions of this statute are necessary to accomplish the object.* It is a provision easily complied with, and one member of the court, at least, has never in practice seen it dispensed with, except in cases of misdemeanor. The provisions of the statute are clear, explicit and peremptory. We know of no power, short of its repeal, to dispense with this requirement. In case of *McIntyre* v. *The People*, 38 Ill., 514, it was held to be error in a case of felony to omit to swear the officer having charge of the jury.

For this error the judgment of the court below must be reversed and the cause remanded."

In *Sanders* v. *The People*, 124 Ill., 218, the defendant was on trial for perjury. On the adjournment of the court at noon the officer who took charge of the jury was sworn by the clerk *as required by the section of the*

statute above quoted. After the court met in the afternoon some further proceedings were had and the jury "retired to consider of their verdict," but the officer attending them *being the same officer in whose charge the jury were placed at the noon adjournment was not again sworn.* In reviewing that question the court said:

"The evidence shows that when the court adjourned at noon the officer who took charge of the jury was sworn by the clerk in the manner required by that section, but after the noon recess the jury returned into court, some further proceedings were had in the trial, the jury then retired to consider their verdict, but the officer who attended them was not again sworn. It would have been better if the officer had been sworn to attend the jury and keep them together and prevent others speaking to them, etc., at the time they retired to their consultation room to agree upon their verdict; *but if the statutory oath was administered to the same officer an hour or more before* they retired to the jury room, we do not regard this as such an irregularity as would justify a reversal. In *Lewis* v. *People*, 44th Ill., 452, it appears that the officer in whose charge the jury were placed while deliberating upon their verdict either was not sworn at all or was not sworn in the mode required by the statute. So also in *McIntyre* v. *The People*, 38th Ill., 514, it appeared that the oath required by the statute was not administered. In the case at bar, however, *such an oath* as the statue provides for was administered by the clerk to the officer in charge. The only peculiarity about it was that it was administered an hour or more before the jury retired, instead of being taken at the time or when they retired. In *McIntyre* v. *The People, supra*, the officer was sworn on adjournment of the court at a previous time in the progress of the trial, just as in the present case. But there the objection was only as to the character of the oath, and not as to the time when it was taken."

This case is an authority in favor of the contention made by the plaintiff in error, not only by the express ruling of the opinion, but also by reason of the

clear indication that even where the officers were sworn within one hour of the retirement of the jury, had the statutory oath not been administered the error would have been fatal. In the case at bar we have, even assuming all the facts as contended for in the affidavits presented by the state, the officers sworn for the last time on February 21, seven days before the jury retired to consider of their verdict, and upon a careful consideration of the affidavits, the fact clearly appears that the statutory oath was not administered, and that the only oath administered was given on February 20th, when there had been but four jurors accepted.

In *Farley* v. *The People*, 138 Ill., 97, the same principle is recognized by that court, wherein they say:

"It is now insisted that it was error to send the jury out a second time to deliberate upon their verdict, they having separated during the night. This error, we think, is well assigned. Under our statute, as at common law, the jury trying a defendant upon a charge of felony, upon retirement to consider of the verdict, must be placed in charge of a sworn officer whose duty it is to keep them together, to prevent others from speaking to them and not to speak to them himself, except to ask if they have agreed upon their verdict and when they have so agreed to return them into court. Section 435 of our Criminal Code (Rev. Stat., Chap. 38) is as follows: 'When the jury retire to consider of their verdict in any criminal case a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place and, to the best of his ability, keep them together without meat or drink (water excepted), unless by leave of the court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court. Provided, in cases of misdemeanor *only*, if the prosecutor for the People and the person on trial, by himself or counsel, shall agree (which agreement shall be entered upon the minutes of

the court) to dispense with the attendance of an officer upon the jury or that the jury, when they have agreed upon their verdict, shall write and seal the same, and after delivering the same to the clerk may separate, it shall be lawful for the court to carry into effect any such agreement and receive any such verdict so delivered to the clerk as the lawful verdict of such jury ' ''

In *State* v. *McCormick*, 46 Pac. Rep., 777 (decided November 7, 1896, in Kansas), the court said:

"The bailiff who took charge of the jury when the cause was finally submitted was not sworn as the statute requires, and this is urged as a ground for a new trial. It appears that when the bailiff was originally appointed by the sheriff, the ordinary oath of office was administered to him and also before the commencement of the trial he was sworn, as follows:

'You do solemnly swear that you will support the Constitution of the United States and the Constitution of the State of Kansas, and faithfully discharge the duties of bailiff of this court, and not let the jury in this case depart or separate without the order of the court; so help you God.' No oath was administered to the bailiff *after the cause was submitted and before the jury retired for deliberation*. The oath that was administered fails to meet the requirements of the statute (Gen. St. 1889, Sec. 5305.) *The oath taken before the trial omitted the requirement to keep the jury together in a private and convenient place, without food*, except such as the court should order, and also that he should not permit any person to speak or communicate with them nor to do so himself. *These provisions were made to protect the jury from improper influences, and were deemed so necessary to the proper administration of the law that they were incorporated into the statute. The oath is important in its nature, and, being specifically required, cannot be disregarded.* For the reasons mentioned, the judgment will be reversed, and the cause remanded for a new trial. All the justices concurring."

In *Buxton* v. *The State*, 14 Southwestern, 480 (decided September 30, 1890, in Tennessee), the Supreme Court of Tennessee reversed that case upon the ground that the oath was not administered.

That this requirement is part of "due process of law" can also not be controverted.

This court as early as 1855 defined "due process of law" as contained in the Constitution of the United States and its amendments as follows:

"The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by law of the land,' in Magna Charta. Lord Coke, in his commentary on those words, says they mean due process of law. * * * That the warrant now in question is legal process is not denied,* * * but is it 'due process of law?' The constitution contains no description of those processes which it was intended to allow or forbid. * * * To what principles then are we to resort to ascertain whether this process enacted by Congress is due process? * * * We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so **we must look to those settled usages and modes of proceeding existing in the common and statute law of England,** before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. * * *"

Murray's Lessee et al. v. *Hoboken Land & Imp. Co.*, 18 How., 272, 276, 277.

In *Thompson* v. *Utah*, 170 U. S., 343, 347, *et seq.*, this court passed upon the meaning and effect of the words, "trial by jury," as contained in the Constitution of the United States as follows:

"As the guarantee of a trial by jury, in the third article (of the Constitution), implied by a trial in that mode and **according to the settled rules of the common law,** the enumeration, in the sixth amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were. * * *

"Assuming then that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions

apply to the Territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the sixth amendment is a jury constituted *as it was at common law*, of twelve persons, neither more nor less. (2 Hale's P. C., 161; 1 Chitty's Cr. Law, 505.) *This question must be answered in the affirmative.* When the *Magna Charta declared that no freeman should be deprived of life, etc.*, 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them *this great privilege* 'as their birthright and inheritance, **as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power."**

That under the trial by jury at common law the same procedure with reference to the swearing of the bailiffs or officers to take charge of the jury was in force as prescribed by statute of the State of Illinois cannot seriously be disputed. In Chitty's Criminal Law, Vol. 1 (star paging 632), the author says:

"When the judge has thus summed up the evidence, he leaves it to the jury to consider their verdict. If they cannot agree in a short time, by consulting in their box, they retire to a convenient place appointed for that purpose, **and the bailiff is sworn to keep** them as follows: 'You shall swear that you shall keep this jury without meat, drink, fire or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them whether they are agreed. So help you God.' This oath of the bailiff comprises, in a great degree, the duties of the jury when they are withdrawn."

See, also,

Dalt C., 185; 2 Hale, 296; Deck Sess., 223, and Bac. Abr. Juries G.

The Supreme Court of Illinois, however, in passing upon this question, in the case at bar said:

"Affidavits made by the bailiffs themselves, and by an assistant of the prosecuting attorn y, who participated in the trial, tend to prove that the oath administered was in the statutory form; but these affidavits also show that the only oath administered to them was on the 21st day of February, immediately after the empaneling and swearing of the jury. It is shown by the bill of exceptions that the trial was not concluded and the jury finally sent out until February 28, so that even by the proof made on behalf of the People the only oath taken, by the bailiffs was some six days prior to their retirement with the jury and prior to the introduction of evidence and the subsequent steps of the trial. This cannot be held to be a compliance with the requirement of the staute that 'when the jury shall retire to consider their verdict,' etc., 'a constable or other officer shall be sworn,' etc. To swear the bailiffs immediately upon the jury being sworn, and prior to the introduction of the evidence, the arguments of counsel and instructions of the court—six or seven days prior to the retirement of the jury to consider of their verdict—**would be less than farcical.**" (371.)

Notwithstanding the above ruling, that court held that the defendant, by not then and there objecting to the jury being placed in charge of officers not sworn as prescribed by the statute and common law, waived that privilege. (374.)

In support of this proposition the Supreme Court of Illinois cited the following authorities:

Reins v. *People*, 30 Ill., 256.
McKinney v. *People*, 2 Gilm., 540.
Holmes v. *People*, 5 Gilm., 478.
Atterbury v. *State*, 56 Ark., 515.
State v. *Frier*, 118 Mo., 650.
United States v. *Ball*, 163 U. S., 662.
People v. *Johnson*, 110 N. Y., 134.

The cases thus relied upon are three cases from Illinois, one from Arkansas, one from Missouri, one decided by the Supreme Court of the United States, and one from New York.

The Illinois cases are:

Reins v. *People*, where there was an express consent and waiver of any irregularity, and concerning which case, as stated in *Farley* v. *People* 138 Ill., 97, at page 102, the decision of the question in that case is not an adjudication upon the effect of the omission in the case at bar.

McKinney v. *People*, in which the question of waiver could not arise, because, as the record there stood, the Supreme Court stated that it would presume that the jury were in charge of sworn officers, inasmuch as the bill of exceptions and record were silent as to that fact.

Holmes v. *People*, a case in which the question is given no consideration, and again where the record did not disclose the fact that the officers were not sworn, and the court there properly inferred that they were sworn, hence the question of waiver could not possibly arise.

As to the cases cited from other states:

State v. *Frier* is decided under the Missouri statute, which is not mandatory, and contains a provision that the jury "may retire under charge of an officer."

U. S. v. *Ball*—Decided independent of any statute, or common law practice, and for the reason that the jury were in charge of a marshal's deputy sworn to perform his duties, etc.

People v. *Johnson*—Decided by reason of an express consent of the prisoner to allow the jury to view the premises where the crime is alleged to have been committed, and for the reasons stated in the excerpt of the opinion hereinbefore quoted.

As against these authorities we have a number of authorities positively affirming and reaffirming the law of the State of Illinois that "*we know of no power short of its repeal to dispense with this requirement*" of the statute.

That the omission here complained of cannot be waived, either by express consent or by a consent implied by lack of objection and exception must be admitted.

McIntyre v. *People*, 38 Ill., 520.
Lewis v. *People*, 44 Ill., 462.
Sanders v. *People*, 124 Ill., 218.
People ex rel. Lyons v. *Hanchett, Sheriff*, 16 Legal News, p. 320.
Harris v. *People*, 128 Ill., 588.
Farley v. *People*, 138 Ill., 97.
Wesley v. *State*, 30 Tenn., 502.
People v. *Shafer*, 1 Utah, 260.
The King v. *Kinnear*, 2 Bar. & Ald., p. 462.
Wiley v. v. *State*, 1 Swans. Rep., p. 256.
State v. *Populus*, 12 La. Ann. Rep., 710.
Commonwealth v. *Shields*, 65 Ky., 81.
State v. *Parrant*, 16 Minn., 178.
Peiffer v. *Commonwealth*, 15 Pa. St., 468.

The statute contains an express prohibition (by exception) against the defendant's consenting to the omission complained of (and this was the common law) and hence there could be no such consent or waiver.

In *Lewis* v. *People*, 44 Ill., 452:

The "*defendant entered a motion for a new trial, for the reason, among others, that the officer taking charge of the jury was not sworn as required by the statute. This ground was supported by affidavit of its truth.*" The trial court

overruled said motion. The Supreme Court of Illinois again said:

"A motion was entered for a new trial, upon the ground, among others, that the jury, when trying the case, after hearing the evidence, retired to consider of their verdict, in charge of an officer who was not sworn *in the mode prescribed by the statute.* The motion was overruled and a judgment entered on the verdict. The record discloses the fact that the officer in whose charge the jury were placed while deliberating on their verdict was not sworn, and this is the only error relied upon for a reversal.

"The provisions of the statute are clear, explicit and peremptory. **We know of no power, short of its repeal, to dispense with this requirement.** In the case of *McIntyre* v. *The People*, 38 Ill., 514, it was held to be error in case of felony to omit to swear the officer having charge of the jury.

For this error the judgment of the court below must be reversed and the cause remanded."

In *Sanders* v. *The People*, 124 Ill., 218, in reviewing the same question that court again held to the same ruling

In *Farley* v. *People*, *supra*, in passing upon the same question, that court again said:

"Waiving the question as to whether under this section the court can lawfully dispense with a sworn officer and authorize the jury in trials for felony to seal their verdict and separate, *even by the consent of the parties*, it is clear this record would sustain no such verdict in any case even that of a misdemeanor. * * * Besides, the attempt here is to dispense with the plain requirement of the statute, wisely enacted for the protection of not only a defendant charged with a high crime, but also to secure the People against all improper influences over juries after the question of the guilt or innocence of a defendant has been submitted to its deliberation, **and we are not disposed to extend agreements made under it by implication."**

In the face of these decisions, the Supreme Court of Illinois has in its opinion announced the doctrine that

the mere silence of the defendant and his counsel, when the jury are sent out without the officer being sworn, is sufficient to repeal or dispense with this requirement of the law.

In *People ex rel. Lyons* v. *Hanchett, sheriff*, 16 Chicago Legal News, Mr. Justice McAllister said:

"There is one distinction which he overlooks, and that is that the substantial constitution of the legal tribunal and the *fundamental mode of its proceeding are not within the power of the parties.*"

In the above case a jury was waived, and a felony case submitted to trial before a court, by consent of both the people and the prisoner.

In *Harris* v. *People*, 128 Ill., 588, the opinion of Judge McAllister is affirmed, and the court, approving the language of a New York case, says:

"The substantial constitution of the legal tribunal, *and the fundamental mode of its proceeding, are not within the power of the parties, and when issue is joined upon an indictment the trial must be by the tribunal* **and in the mode which the constitution and laws provide,** *without any essential change.* The public officer prosecuting for the people has no authority to *consent* to such a change, *nor has the defendant.*"

In conclusion the court there said:

"We are of the opinion, then, both upon principal and authority, that the Criminal Court has no legal power to try the defendant without a jury, notwithstanding her consent and agreement in that behalf, and that the trial and conviction are therefore erroneous." (pp. 593, 594.)

In *Wesley* v. *State*, 30 Tenn., 5021, the court said, quoting approvingly from another authority:

"I am also of the opinion that the consent of the judge would not make in such case that lawful *which was unlawful in itself*, for if the law requires that the jury shall

at all events be kept together until the close of a trial for a misdemeanor it does not appear to me that the *judge would have any power to dispense with it.*"

In that case it appears from the record and the opinion of the court that the jurors,

"*with the consent of the defendant and attorney-general, * * * were by the court permitted to disperse until the next morning.*"

In *People* v. *Shafer*, 1 Utah, 260, the court said:

"We do not think the error complained of was cured by the consent given by one of the attorneys for the defendant, even if it should be admitted that the attorney could give such consent for the prisoner. The defendant is not in a situation to exercise a fair choice, for he must run the risk of improper influences reaching their minds if he consents, or of prejudicing them against him if he refuses. According to what is probably the better doctrine, the consent of a prisoner to a separation, which the general rules of the law do not permit, should never be asked of him; and if it is asked and granted, or even granted without his being asked, it will avail nothing. It was error to allow the jury to separate, and the error was of such a nature as to vitiate the verdict."

In *King* v. *Kinneare*, 2 B. & A., 462, the court said:

"*I am also of the opinion that the consent of the judge would not make in such case that lawful which was unlawful in itself*, for if the law requires that the jury shall at all times be kept together until the close of the trial for a misdemeanor, it does not appear to me that the judge would have any power to dispense with it."

In that case the separation was *by the consent* of the accused.

In *Wiley* v. *The State*, 1 Swans. Rep., 256, the court reaffirmed the same doctrine, and held that

"If the jury pending the trial of a felony dispersed, though with the consent of the prisoner, a new trial will be awarded."

In *State* v. *Populus*, 12 La. Ann., 710, the court said:

"We do not think that the consent of the prisoner or of his counsel ought to suffice to permit the separation."

In *Commonwealth* v. *Shields*, 65 Ky., 81, the court held that:

"As the law is imperative that the officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves, a failure on the part of the court so to swear the sheriff or other officer taking charge of the jury was a sufficient reason for setting aside the verdict and granting a new trial."

In *State* v. *Parrant*, 16 Minn., 178, upon an error raised for the first time upon the motion for a new trial, the court said:

"It may be admitted as to modes of procedure and trial it is competent for the court to make and alter its rules as the ends of justice may require, *when there are no statutory directions, but where there are any they must be adhered to.* (The jury in this case were allowed to take a recess for five minutes, without being accompanied by a sworn officer.) * * * We need not inquire whether the defendant could have waived the objection thus arising, for he has not attempted to do so. His consent was not asked, and that he did not object is therefore no evidence that he assented. For the aforesaid error in law the verdict must be set aside."

In *Peiffer* v. *Commonwealth*, 1 5 Pa. St., 468, it is held:

First, that the common law, with reference to the conduct of a jury in the trial of a case,

"touches not matter of form, but matter of substance,"

and that:

"In this case the jury were allowed to separate after they were impaneled and sworn. True, that took place

with the prisoner's consent. * * * Still, I think no consent of a prisoner in the extremity of his need ought to bind him."

The judgment was therefore reversed.

Under these authorities can it be contended that the defendant is not deprived of his liberty without due process of law?

II.

THE DISCHARGE OF THE JURY ON THE FIRST TRIAL UNDER THE CIRCUMSTANCES IN THE CASE AT BAR.

Section 10 of the bill of rights, being article 2 of the constitution of 1870, of the State of Illinois, provides:

"No person shall be compelled in any criminal case to give evidence against himself or *be twice put in jeopardy for the same offense.*"

If the discharge of the jury by Judge Haney on September 2, 1899, over the objection and protest of the defendant, without any good and sufficient *legal* reason, created, as we contend, a discharge of the defendant then again putting the defendant upon trial under the same indictment, for the same offense, was putting the defendant twice in jeopardy for the same offense, in contravention of the Constitution of the United States.

Chapter 28 of the Revised Statutes of this state (Hurd's Rev. Stat., 399,) provides,

"*That the common law of England*, so far as the same is applicable and of a general nature, and all stautes or acts of the British Parliament made in aid of and to supply the defects of the common law *prior to the fourth year of James the First* * * * and which are of a general nature and not local to that kingdom, shall be the rule of decision and shall be considered as of force until repealed by legislative authority."

Sec. 428 of the Criminal Code (Hurd's Rev. St.), provides:

"All trials for criminal offenses *shall be conducted according to the course of the common law*, except when this act points out a different mode, and the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases except as otherwise provided by law."

The common law of England referred to in our statute is that,

"A jury sworn and charged in case of life or member *cannot* be discharged by the court or any other, but they ought to give a verdict." (Coke upon Littleton, p. 227, par. F.)

and

"When the evidence on both sides is closed, and indeed, when any evidence hath been given, *the jury cannot be discharged unless in cases of evident necessity, till they have given in their verdict.* * * *" (Book 4, p. 359, Vol. 2, Sharswood Blackstone Com.)

The legislature not only by express enactment has adopted this common law of England, thereby adopting its law with reference to the discharge of juries, but recognized the effect of that law with reference to the juries in this state by the adoption of the following statutes: Section 434 of the Criminal Code (Hurd's Rev. Stat., 636), provides that

"the court in which a trial for a criminal offense in pending *may continue in session until the verdict is rendered and judgment entered*, notwithstanding the judge may be required by law to hold court in another county before the conclusion of such trial."

Thereby avoiding the effect of the common law rule that when the term expired *eo instanti* the jury were discharged.

Section 435 of the Criminal Code provides that

"when the jury retire to consider of their verdict in any criminal case a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted), unless by leave of the court, **until they shall have agreed upon their verdict**, nor suffer others to speak to them, and that *when they shall have agreed* upon their verdict he will return them into court. * * *"

Not only is this a recognition of the force in this state, of the common law rule with reference to the discharge of the jury, but by the very words of the statute the officer is sworn to keep the jury together "*until they shall have agreed upon their verdict.*"

Section 5 of the bill of rights provides that "The right of trial by jury as heretofore enjoyed shall remain inviolate. * * *"

This latter section of the bill of rights has been construed by our Supreme Court in

Harris v. *People*, 128 Ill., 585, and
George v. *People*, 167 Ill., 447.

In the latter case (p. 456) the court said:

"By the clauses of the consitution above cited the common law right to a trial by the jury in criminal cases is guaranteed and declar d to be inviolable, and the statute requires that, except as therein provid d, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevail d at common law is necessarily excluded. It is, however, said that the words '*as heretofore enjoyed*' *relate to those enjoyed at the time of the adoption of the constitution of* 1870. * * * The word '*heretofore*' as used evidently relates to the past, and in order to determine the true meaning of the words 'the right of trial by juries as heretofore enjoyed' **it is necessary to go back to the common law of England. When this is done it will be found that the right of trial by**

jury constitutes certain specific things which cannot be dispensed with or disregarded on the trial of a person charged with a felony. * * * *If the language 'the right of trial by jury as heretofore enjoyed shall remain inviolate' shall be construed to mean that the system of trial by jury as it existed by statute at the time the constitution of* 1870 *was adopted was engrafted on and became a part of the constitution, as is contended, many embarrassing results never contemplated would follow.''*

This court has committed itself to the same general doctrine in *Muray's Lessee* v. *H. L. & I. Co.*,18 How., 272, *Thompson* v. *Utah*, 170 U. S., 343, cited at length *supra.*

In *Farley et al.* v. *People*, 138 Ill., 97, 100, the court said:

"Under our statute at common law the jury trying a defendant on a charge of felony, upon retirement to consider of the verdict, must be placed in charge of a sworn officer, whose duty it is to keep them together, to prevent others from speaking to them and not to speak to them himself except to ask if they have agreed upon their verdict, **and when they have so agreed to return them into court.**

In *Logg* v. *The People*, 8 Ill. App., 99, 106, the court said:

"That the acceptance of such verdict and the discharge of the jury, under such circumstances, entitles the defendants to their discharge is clearly established by the authorities above cited, and perhaps it may be said that those decisions rest upon the ground that the jury have been discharged by the court, *there being no necessity therefor*, and no consent of the prisoner being had without having determined the only issue in the case.

Where an obvious necessity arises or some matter occurring during the trial that could not be foreseen or prevented for discharging the jury, the court has the undoubted power to discharge them without releasing the defendant, even though such action be taken against his objection, as where the jury are unable to agree and longer confinement would be unreasonable, or the sudden

sickness of the judge. *Nugent* v. *The State*, 4 Stewart & Porter, 72; *Rex* v. *Edwards*, 3 Campbell, 207; *Rex* v. *Streek*, 1 C. & P., 413; *Stone* v. *The People*, 2 Scam., 325, and *Com.* v. *McFadden*, 23 Pa. St., 12.

In these and kindred cases the jury can be discharged and the prisoner again put on trial, but if no such necessity exist and the defendant does not consent to a discharge of the jury, he is entitled to a verdict upon the first trial, and if the court should, *in such case, discharge the jury without a verdict, it operates an acquittal.*

We also cite the following authorities to this point: *Weinzorplin* v. *The State*, 7 Blackford, 186; *Wright* v. *The State*, 5 Ind., 290; *Mahala* v. *The State*, 10 Yerg., 536; *McCauley* v. *The State*, 26 Ala., 135; *Hines* v. *The State*, 8 Humphreys, 597; *State* v. *Poage*, 3 Ohio St., 239; *Commonwealth* v. *Williams*, 2 Grattan, 570; *Grant* v. *The People*, 4 Parker, C. C., 527; *State* v. *Reynolds*, 3 Kelly, 60.

The decisions thus holding, it is true, have generally been made in cases of felony, but we are of the opinion that in this state no distinction can be made in this regard between felonies and misdemeanors, as the declaration in our bill of rights, 10 Const. of 1870, that 'no person shall be twice put in jeopardy for the same offense,' is sufficiently comprehensive to include any violation of the criminal law of the state, the word 'offense' applying alike to all crimes of whatever grade.

In the Constitution of the United States, and in most of the states of the Union, as well as in those of 1818 and 1848, of this state, this guarantee of personal liberty is somewhat different in its phraseology, being substantially that 'no person shall for the same offense be twice put in jeopardy of life or limb.' And it has been thought by some that such prohibition only extended to felonies, as it could not be said that a person who had committed a less offense than that of felony was placed in jeopardy of life or limb. If there could be any doubt regarding the proper construction of such clause in our prior constitutions, we think all such have been effectually removed by the words of the present one."

In *Mahala* v. *The State*, 10 Yerger's Reports (Tenn.), p. 235 (referred to in the same opinion), the defendant

(a slave) was indicted. She pleaded not guilty. On May 3 a jury was impaneled. The trial was concluded several days thereafter, at about 2 o'clock. After the jury was absent about half an hour they came into court and informed the judge that they could not agree; whereupon they retired again. In about an hour and a half they again came into court and stated that they could never agree. The jury thereupon retired again and did not agree that day. The court thereupon had them confined together that night, and the next morning, about half past nine, the jury again came into court and told the court it was impossible for them ever to agree.

Whereupon the court, being satisfied that the jury could not agree, discharged them. The defendant then made a motion for discharge upon the ground that the court had no authority to discharge the jury under the circumstances and that it operated as an acquittal. The court denied that motion, and thereupon the defendant was again placed upon trial and convicted and sentenced to death.

From the latter judgment a writ of error was prosecuted to the Supreme Court, and in passing upon the question there and here at issue, the court said:

"The right of trial by jury has always been regarded by the English and American jurists as one of the most sacred principles of the law, one to which the citizen is more deeply indebted than to any other for that security to life, liberty and property guaranteed in Great Britain and the United States to an extent unknown in other countries, and the preservation of which, in its purity, and independence, has at all times been guarded with a most watchful and jealous eye.

Therefore it is, that an attempt whenever made by the courts to interfere with the privileges of a jury, and endanger their independence, and the consequent security of the

subject, has at all times been promptly resisted, and though, occasionally, in times of great political excitement in England, it may have succeeded for the day, yet to the honor of the legal profession, the usurpation has always been rebuked, and the proper balance of power between the court and the jury quickly restored.

It is a well understood maxim of our law that the judges are to expound the law and the jury to ascertain the facts, neither of which has the power to interfere with the province of the other. The jury in their deliberations upon the facts are as independent of the court as the judge in determining the law is of the jury, and the consequence is that when a case has been submitted to a jury there it must remain until it has been decided by them or is withdrawn from their consideration, **not at the will and pleasure of the court, but under circumstances justified by the law.** In the case now presented for the consideration of this court the jury returned no verdict, and the case was taken from their consideration, and *they discharged* against the consent of the prisoner. And the question is whether, under the circumstances, this was not an illegal exercise of power on the part of the court below, and the prisoner, in consequence, entitled to her discharge? This is a question of much importance, and although it has not, perhaps, been directly settled by adjudicated cases in this state, we feel much relieved in the conviction that it is well settled both by principle and authority in England, and a very respectable portion of the states of this Union. **Lord Coke in his 1 Institute, 227, b, and 3 Institute, 100 lays it down as a general rule that a jury sworn and charged by the court in cases affecting life or member cannot be discharged by the court, or any other, but they ought to give their verdict.** This doctrine, upon the authority of Coke, was afterwards engrafted by Hawkins and Blackstone into their elementary treatise on the criminal law. And although this principle was controverted in the case of Ferras cited in Sir Thomas Raymond, 84, and in a case of larceny reported in 1 Ventress, 69, and one reported in Salkeld, 646, yet it cannot be said to have been fully examined and completely overruled, until the decision of the case of the two Kinlocks,

reported in Foster from page 22 to 40, when it was considered by all the judges but one that the general rule laid down by Lord Coke had no authority to warrant it, and could not be universally binding; but that there were exceptions to it, and in that case determined that the court had power to discharge a jury at the request of the prisoners, assisted by able counsel, and with the intent of imparting to them a privilege which they could not otherwise have enjoyed. Since that decision it has not been doubted that the courts have the power to discharge juries without their rendering a verdict, but only as we think in cases of *manifest necessity*. All the cases of exception (to the general rule as laid down by Lord Coke), specified in the elaborate opinion of Mr. Justice Foster in the case of the Kinlocks, *are cases of necessity*, and there is no authority to be found in the English books which sustains the position that a jury may be discharged in a criminal case without the consent of the prisoner, but from necessity. Such also, we think, has been the train of the decisions in the United States.

In the case of *The People* v. *Goodwin*, 18 Johnson's Reports, 187, Judge SPENCER, in delivering the opinion of the court, says: 'Upon full consideration, I am of opinion that although the power of discharging a jury is a delicate and highly important trust, yet, that it does exist in cases of extreme and absolute necessity.'

In the case of the *United States* v. *Coolridge*, Gallison's Rep. 364, Justice STORY says 'that the power to discharge a jury in capital cases should only be exercised under very extraordinary and striking circumstances.'

In the case of the *United States* v. *Haskell & Francois*, 41 Wash., 411, Judge WASHINGTON says 'that a court is fully authorized to discharge a jury in cases of necessity, in capital cases as well as misdemeanors.'

In the case of the *United States* v. *Perez*, 9 Wheaton, 579, Judge STORY, in delivering the opinion of the court, says:

'We think that in all cases the law has invested courts with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity, for the act, or the ends of public justice would be defeated;

but that the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes, and in capital cases especially the court should be extremely careful how they interfere with any of the chances of life in favor of the prisoner.'

In the case of *The People* v. *Barrett*, LIVINGSTON, Judge, says:

'Without denying the right of courts to withdraw a juror, in criminal cases, and put the defendant on trial a second time, it is evident this power should not be lightly used, but confined as much as may be to cases of urgent necessity, *when by the act of God, or by some sudden and unforeseen accident*, it is impossible to proceed without manifest injustice to the public or to the defendant himself.'

These decisions, made by the first tribunals of the country, completely sustain the position that the power to discharge a jury, without a verdict, is not the exercise of an arbitrary discretion, but an extremely delicate duty, only to be performed in cases of urgent necessity.

This brings us to the examination of what constitutes this necessity. We are of opinion that the causes which create this necessity may be classed under three heads. 1st. Where the court is compelled by law to be adjourned before the jury can agree upon a verdict. 2nd. Where the prisoner, by his own misconduct, places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the state, or is himself, by the visitation of providence, prevented from being able to attend to his trial; and 3rd. Where there is no *possibility* for the jury to agree upon and return a verdict.

It is upon the last of these propositions that the question in the case under consideration arises. The jury were impaneled on Thursday evening, at 2 o'clock, and were discharged at 9 o'clock on Friday morning, because they could not agree upon a verdict, the court continuing its session until some time on the Saturday following. Now, the question is, was this such a case of necessity as justified the court in discharging the jury? A jury may not be able to agree upon a verdict for many rea-

sons, *such as sickness or insanity of one or more of the jurors, sudden exhaustion of the jury before they have been able to come to a decision of the case, the absconding of one of the jurors without the consent of the court.* These are cases put in the books, and with others of like character constitute what we will distinguish as cases of physical impossibility. A jury may also not be able to agree **because their minds cannot come to the same conclusion from the facts submitted to their consideration.** This we would consider as a case of *moral* impossibility; and we are called upon to say whether it constitutes a necessity for the discharge of a jury before the time arrives when the court must adjourn. **We think it does not.** In the case of the Kinlocks, Mr. Justice Foster enumerates many cases in which from necessity a jury may be discharged, and never once intimates that it may be done merely because *they could not bring their minds to concur in the same opinion.* It cannot be possible that he should have [neglected doing so if in his opinion it had constituted a case of necessity, for it would be so palpable a course for the exercise of this delicate power, and would be of such frequent occurrence that no judge could overlook it in enumerating the causes for which a jury might be discharged from rendering a verdict. Indeed, it is almost manifest that Mr. Foster was of opinion that it did not constitute a case of necessity, for in commenting upon Mansel's case he says, 'the truth of the case was no more than this, the jury were not agreed on any verdict at all, and therefore nothing remained to be done by the court but to send them back and keep them together until they should agree to such a verdict as the court could have received and recorded.'

There is no English decision, then, sustaining the position that the court has the power to discharge a jury because they cannot agree upon a verdict, unless there be some physical impossibility connected with it, and so we think is the spirit of all the American authorities when properly understood."

In conclusion the court says that;

"Upon the whole the power of discharging a jury against the consent of the prisoner is of such a dangerous

character that we hesitate not in saying that it should not be exercised by the courts where the jury cannot agree on a verdict *unless they be prevented by a physical impossibility from so doing*, and that when such impossibility does not exist the jury should be kept together until such time as the court is about to adjourn, when, of necessity, they must be discharged. There was no physical impossibility for the jury to agree, * * * and the judgment must, therefore, be reversed and the prisoner discharged."

In *McCauley* v. *The State*, cited in the opinion in *Logg* v. *The People*, *supra*, after the defendant had been put upon trial, without the consent of the defendant the court allowed a co-defendant leave to sever the trial, and withdrew the cause as to the defendant from the jury to whom the case had been submitted for trial. In passing upon the effect of the discharge the Supreme Court of Alabama said, (referring to numerous authorities,) that

"In *Ned* v. *The State*, 7 Porter's R., 187 (a capital case) our predecessors, upon a review of the leading English and American authorities, decided (among other things) that courts have not, in capital cases, a discretionary authority to discharge a jury after evidence given; that a court does possess the power to discharge a jury in any case of pressing necessity; that, although the judge determines the existence of the facts, yet, when they are ascertained, the law determines whether they constitute a case of necessity; and that the unauthorized discharge of a jury is equally as fatal to any subsequent trial as an acquittal or conviction.

In *Cobia* v. *The State*, 16 Ala., 781 (an indictment for murder), this court held that the discharge of the jury, before the verdict was rendered, 'must be understood to mean a legal discharge' and that the result of the authorities was, 'that if the prisoner be put on his trial upon a sufficient indictment, and the evidence in support of the charge is submitted to the jury, the court cannot arbitrarily interfere and arrest the trial by discharging the jury, and if the court should discharge the jury be-

fore they deliver their verdict, without a sufficient legal reason for doing it, the prisoner shall never be tried again.'

Every decision of this kind rests upon this solid ground: that such decision is essential to preserve inviolate to the prisoner the right of trial by jury, as guaranteed by the constitution. This right cannot mean less than a right to have the deliberations of the jury, when once they have begun the trial and heard any evidence, continued until the occurrence of a sufficient legal reason for their discharge, and the right to have, during the entire period of such continuance, the chance of a verdict of acquittal at the hands of that jury. *It is impossible for any judge to say that the jury would not have acquitted him.* It is equally impossible for any judge to say he can get another jury who will acquit him. The law does say, if the jury ever does acquit him, their verdict shall not be set aside by any court, however unwarranted by the law and the evidence in the case that verdict may be. The chance of a verdict by acquittal at the hands of each jury to whom the cause and any evidence have been submitted, it is obviously important to a prisoner, and is clearly embraced in the guaranty of trial by jury. To deprive the prisoner of this chance by the lawless act of the court in discharging the jury is a flagrant wrong, for which there is no remedy, *except to treat such deprivation as equivalent to an acquittal.* To hold that there is no remedy for such a wrong is to hold that the right of trial by jury has ceased to be a right; for if by such lawless act of the court one jury may be discharged, an indefinite number may be discharged in the same manner.

That the ground above stated is the unassailable ground upon which the decisions above cited must rest is evident from the fact that whilst they hold that the unauthorized discharge of a jury before they render a verdict will protect the prisoner against a subsequent trial as fully as a verdict of acquittal, they also hold that if the prisoner has been actually convicted, and the judgment has been reversed, or a new trial granted, at his instance, he may be tried again. The principle which reconciles these two positions, thus maintained in these decisions,

may be thus stated: The constitutional guarantee of trial by jury is broken by the lawless discharge of a jury after they hear some evidence and before they render a verdict; but, where a trial is actually had, and a verdict of guilty rendered, that guarantee is not broken by mere errors committed on that trial, for the correction of which a remedy is provided by law. If the prisoner has not been lawlessly deprived of his chance of a verdict of acquittal, by an unauthorized discharge of a jury, but has had a trial by jury and been found guilty—in that case, although errors may have been committed by the court on the trial, to his prejudice, he has his remedy whereby he can procure from a revising court the correction of such errors—the reversal of the conviction, and another chance for a verdict of acquittal on a subsequent trial. If, however, the prisoner has been deprived of his chance of a verdict of acquittal by a jury who have begun his trial and heard some evidence, by the lawless discharge of that jury, there is no remedy anywhere for this lawless discharge, except to treat it as equivalent to an acquittal. **To withhold the only remedy in such a case is to surrender to the lawless discretion of the judge the constitutional right of trial by jury."**

The same doctrine was reaffirmed by that court in even a stronger opinion in *ex parte Vincent*, 43 Alabama, 402.

In *Commonwealth* v. *Williams*, 2 Grattan (Va.), 570, the question arose upon an application for a writ of habeas corpus. The facts set forth are that the defendant was indicted and put upon trial on October 28. The jury were sworn in his case, and having heard the same, were sent out to consult of their verdict, and not being able to agree, were, on the adjournment of court on that day, committed to the care of the sheriff and the prisoner remanded to jail. On the 29th of the same month the defendant was again sent to the bar and the jury were brought into court, and not having agreed on a verdict, were again committed to the custody of the sheriff and the defendant

again remanded to jail. On the 30th day of the same month the jury were again brought into court, and not having agreed on their verdict were again committed to the custody of the sheriff. That after some time they declared it was impossible for them to agree, and that the court thereupon made the following order:

"**That the court declared it as its conviction that there was no possibility of the said jury rendering a verdict during the term,** and that the further detaining of them would be a hardship upon them and would not promote public justice nor benefit the accused. Whereupon it was ordered by the court that the said jury be discharged and he (the petitioner) again remanded to jail, to which order discharging the jury the prisoner objected."

The court commented upon that state of facts as follows:

"The question presented for the consideration of the court is, whether the court, in a case of felony, can properly discharge the jury who are sworn in the case, without the consent of the accused, *merely because the jury cannot agree.* We think the courts have not and ought not to have such power. No such practice has ever prevailed in Virginia; and so far as the judges now composing this court are informed, this is the first instance in which it has ever been done or attempted. In looking to England, we do not find such power to have been exercised or claimed there. In looking to our sister states, we find the practice has varied; in some of them, to wit, in New York and Massachusetts, the courts have claimed and exercised this power. See the cases of Olcott, 2 John. Cas., 301; Goodwin's case, 18 John R., 187, and Green's case, 13 Wend. R., 55; Barden's case, 9 Mass. R., 467; Purchase's case, 2 Pick. R., 521. In Pennsylvania the judges have denied the power. See the cases of Cook and others, 6 Serg. & Rawle, 577; and Clue's case, 3 Rawle, 498.

We incline to the views and reasoning of the courts of Pennsylvania on this important question.

This court, in the case of the *Commonwealth* v. *Fells*, 9 Leigh, 613, decided that the court might properly discharge the jury in a case of felony, whenever a necessity for so doing existed; and cited as authority the case of Ann Scalbert Leach's C. L., 620; *Rex* v. *Stevenson*, *id.*, 546; and *The King* v. *Edwards*, 4 Taunt. R., 309. In the case of Ann Scalbert, after the jury were sworn, one of them fell down in a fit. In the case of *The King* v. *Stevenson*, the prisoner himself became suddenly ill and unable to attend to his defense. In the case of *The King* v. *Edwards*, one of the jury became ill and unable to attend to the examination of the case. In Fell's case the jury had been kept together nine days; the health of one of the jurors was suffering materially from the long confinement; and the personal attentions of another juror were required by his wife, whose peculiar and delicate situation rendered it proper and necessary. In that case the judge before whom the case was tried discharged the jury, and this court affirmed the decision, and decided that the facts of that case showed a case of necessity, which rendered the discharge proper. *But while we approve that decision, we think that mere inability on the part of the jury to agree presents no such case of necessity.* We think, moreover, the exercise of such a power of discretion ought not to be allowed; that the accused is entitled to be tried by the jury he has selected in the first instance, unless there be some *imperious* necessity for their discharge, in which event another jury may properly be sworn to try him. The practice in Virginia has been, in the case of a hung jury, in a trial for felony, either to adjourn the court at the end of the term, taking no notice of the jury; in which case they are necessarily discharged by operation of law, or else to call the jury in and discharge them simultaneously with the final adjournment of the court; which practices this court approve and think right."

The court thereupon unanimously decided that the petitioner was entitled to his discharge, and so ordered.

We have quoted thus at length from the above authorities that this court might consider the reasoning of those

cases. In the cases following, this question was considered, and we quote briefly from the opinions of the respective courts in which this point has been determined.

NORTH CAROLINA:

In the case of *State* v. *Ephriam*, 19 N. C., 162: The question arose upon *habeas corpus*. The petitioner was charged and put upon trial for murder. The jury, after having been out some time, returned into court and declared they could not agree. Two of the jurors stated that they were ill, one of whom said he had a sore throat, the other that he had been attacked with rheumatism. The court thereupon discharged the jury and recited upon the record that "the court, in the exercise of its decretion, believing this to be a case for the discharge of the jury, ordered a juror to be withdrawn and the jury to be discharged." In passing upon the question the court said:

"Our conclusion, therefore, from so much of the record as speaks of what was done in the Superior Court or by that court touching the discharge of the jury is, that the judge ordered the discharge and intended to say that he ordered it *not upon any necessity, but as being a thing within his discretion* and because this was a proper case for the exercise of this discretion upon his official responsibility. * * * (171.) There is, therefore, no foundation for the notion of a moral necessity for the discharge of a jury on account of a moral disability, as it is called, on the part of the jury to make up their minds alike and agree on a verdict after a reasonable period for consultation. It is doubtless a relief to the jury to be freed from longer confinement and privation, which is the consideration from which this practice seems chiefly to have grown up. * * * (176.) Our decision is, therefore, founded upon this, that *the record shows that the jury was discharged without an explanation thereof showing any state of facts from which the discharge becomes necessary.* This is indispensable, because by no other means

but the record can the necessity appear, and by that it can always be made to appear, with the single exception of the sudden insanity or death of the judge during the trial—a case not yet decided, and which may probably found another exception upon necessity to the general rule." The prisoner was thereupon discharged.

In the case of *State* v. *Altman*, 64 N. C., 364, the jury retired to consider of their verdict at 8 o'clock P. M. of Saturday in the first week of the term, "and being unable to agree," came to the bar of the court on Monday evening at half past five o'clock, when a juror was withdrawn and the jury discharged. The prisoner moved for his discharge from custody. In passing upon the question the court said (366):

"The case was committed to the jury on Saturday evening of the first week of the term, and the jury was discharged on the evening of the Monday of the second week, after a deliberation of about forty-five hours. We do not think that the mere lapse of that space of time without an agreement by the jury, coupled, as we may suppose it to have been, with their declaration that they probably could not ever agree, was a sufficient cause for their discharge. To be put in jeopardy of one's life through a criminal trial is a grave occurrence. The common law, as once understood, absolutely prohibited a second jeopardy, and the principle is incorporated in the constitution of the United States." The prisoner was therefore discharged.

MISSISSIPPI:

In the case of *Whitten* v. *The State*, 61 Miss., 717: The question there arose whether or not the accused should be discharged because of the discharge of the jury without rendering a verdict. In that case the jury retired to consider their verdict at half past 8 at night on the last day of the term. At 12 o'clock the court sent for the jury and after polling them "ascertained that they

could not agree and were not likely to do so." Thereupon the court discharged them, the defendant neither consenting nor objecting to such action, and the court was adjourned. Being arraigned again for the same offense, the defendant pleaded the above facts and claimed forever to be discharged, because the record showed that he had been once in jeopardy, and the jury having been discharged without his consent he could not be again tried for the same offense. The sole question in this case was "Whether the court had a legal right to discharge the jury." In passing upon the question, the court said:

"Whatever doubt may exist in other states it is well settled here that the submission to a lawfully impaneled jury and a subsequent willful or unlawful dismissal of that jury constitutes former jeopardy, and entitles the party to a final discharge. It is equally well settled that this effect will not follow *when the discharge of the jury is compelled by a physical or legal necessity*, as by the death or sickness of a juror, by the failure of the jury to agree after full and sufficient deliberation, or by the legal termination of the term. Some such necessity, however, must compel the discharge in order to make it permissible; and up to the adoption of the code of 1880 the court could order a discharge upon the ground that the time for closing the term had by law arrived. Josephine's case, 39 Miss., 613; Teat's case, 53 Miss., 439.

Such was the law until the adoption of the Code of 1880. Section 2292 of that code is as follows: 'When the trial or hearing of any case, civil or criminal, has been commenced and is in progress in any court, and the time for the expiration of the term as prescribed by law shall arrive, the court may proceed with such trial or hearing and bring it to a conclusion in the same manner and with the same effect *as if the stated term had not expired.*'

By this section there can be no ending of a term when a trial has been entered upon and is not completed, or at least *there can never be any necessity for such end-*

ing, because the court, being empowered to continue the term, may do so at its own pleasure.

But the power to dismiss a jury in prosecutions for a felony can never depend on pleasure. Such power is wholly dependent on necessity, either physical or legal. *Where there is no necessity there is no power.* Such unquestionably are our adjudications. It is a contradiction in terms, therefore, to say that the power of continuing the term is optional with the judge. The trial being begun and the jeopardy encountered, any dismissal of the jury is arbitrary which is not compelled by necessity. If the court may continue at the pleasure of the judge, it is idle to say that necessity compels the discharge of the jury pending the trial on the ground only that the law speaks of a court being held elsewhere.

Court is never obliged to meet elsewhere so long as a trial is progressing where it then is.

Whenever the court may prolong a term, it must do so, **since the prisoner by his silence consents to nothing.**

Such are the decisions in the only cases where we find where the direct question has arisen under statutes nearly similar to our own. *Wright* v. *State*, 5 Porter (Ind.), 290; *State* v. *McGimpsey*, 60 N. C., 337."

In conclusion the court held that "the minute the jury was discharged the prisoner was discharged also."

The same rule of law was followed and adopted in *Helen* v. *State*, decided by the Supreme Court of Mississippi in 1889, 6 Southern Reporter, 322.

VIRGINIA:

Williams v. *The Commonwealth*, 2nd Gratt., 568, quoted *in extenso, supra.*

WEST VIRGINIA:

In the case of *Crookham* v. *The State*, 5 W. Va., 510: The Court of Appeals of West Virginia reaffirmed the doctrine of *Williams* v. *The Commonwealth*, 2d Gratt., 567, and in commenting upon that case refer to the provisions to be found in the Code of West Virginia, which are

that: "In any criminal case the court may discharge the jury when it *appears* that they cannot agree on a verdict;" and referring to that provision of the code the court says: "The order of the court states that the jury *being unable to agree* upon a verdict were discharged. Unless the provision of the code just quoted is to be disregarded, the court committed no error in discharging the jury without the consent of the prisoner." In other words, if that provision of the code had not been in force the court would have committed error in discharging the jury.

NEBRASKA:

In the case of *Conklin* v. *The State*, 41 N. W. Rep. (Neb.), 788, decided February 20, 1889: The jury had been out a space of twenty hours, and being unable to agree, they were discharged. The defendant pleaded these facts under a plea of former jeopardy, when he was placed upon trial a second time. Under section 485 of the criminal code of Nebraska a court may discharge a jury "in case * * * they have been kept so long together there is no probability of agreeing. * * *"

The journal entry of the court showed:

"Comes also the jury and reports in open court their inability to agree upon a verdict in this cause, and it appearing to the satisfaction of the court, upon examination of Brown, one of the jurors in said case, that by reason of his sickness he was unable to further perform his duties as a juror, and upon further examination of each and every juror in said case, the court finds there is no probability of the jury's agreeing upon a verdict and that they had been out twenty-one hours without sleep, or a suitable place to sleep or rest, said jury is, therefore, discharged without day, without prejudice to the prosecution."

In an elaborate opinion, passing upon the effect of the

facts thus stated in the plea of the defendant, to which the state had demurred, the Supreme Court ordered that the judgment of the lower court in sustaining the demurrer to the plea should be overruled and that the defendant should be placed upon trial on the plea if the state had any answer to make thereto.

To the same effect is *State* v. *Schuckart*, 18 Neb., 754.

PENNSYLVANIA:

In the case of *Commonwealth* v. *Fitzpatrick*, 121 Penn. State Rep., 109: The facts are expressed in the opinion of the court, and the court there said:

"The defendants in error, who were defendants below, were indicted and put on trial for murder. At the conclusion of the evidence the questions involved were discussed by counsel, and the jury, after the charge of the court, retired to deliberate upon their verdict. This was on the 1st day of February, 1887. On the 5th of the same month, which was Saturday, and the last day of the regular term of the court, the jury not having agreed upon a verdict, was discharged by the court, notwithstanding the objection of the defendants. The learned judge of the Oyer and Terminer caused the following adjudication to be entered on his minutes: 'Now, to-wit, 5th February, 1887, the jury in this case having come into court repeatedly and affirmed that they could not agree, and that they had made every possible effort to agree, and that they still cannot agree, the term of the court now expiring, the court being satisfied that it is useless to detain the jury longer, the jury are discharged from the further consideration of the case, to which order and discharge the defendants except, at whose request a bill is sealed.'

The defendants were again called for trial in the following month of May, and pleaded specially the former trial and the discharge of the jury without rendering a verdict, in bar of any further trial for the same offense. The commonwealth demurred to this plea, and the court, after argument, entered judgment on the demurrer in favor of

the defendants and discharged them from custody. The question thus raised is whether the facts set forth in the special plea show that the defendants have been once in jeopardy for the offense now charged against them. If so, the constitutional provision that 'No person shall for the same offense be twice put in jeopardy of life or limb,' is a conclusive answer to the indictment.

Jeopardy is the peril in which a defendant is put when he is regularly charged with crime before a tribunal properly organized and competent to try him. He must under such circumstances submit the sufficiency of his defense to the decision of a jury of his peers. He is in their hands, exposed to the danger of conviction with all its consequences; or, in the language of the bill of rights, he is 'in jeopardy.' From this jeopardy he is to be relieved, if relieved at all, by the verdict of the jury. Unless some overriding necessity arises after the jeopardy begins, the trial must proceed until it ends in a conviction or an acquittal. In a capital case, therefore, the court has no power to discharge a jury without the consent of the defendant, unless an absolute necessity requires it. *Commonwealth* v. *Cook et al.*, 6 S. & R., 577. **The mere inability of the jury to agree within a few hours or days is not such a necessity:** *Commonwealth* v. *Clue*, 3 S. & R., 498; nor is the fact that the regular term is approaching an end, for the courts have power to continue the term until the case can be properly ended.

The serious illness or insanity of the defendant, and the illness, insanity or death of the judge or a juror engaged in the trial have been held to create a necessity for the withdrawal of a juror and the postponement of the trial; and it is not difficult to imagine other cases in which a similar holding should be made. In this case, however, we take notice of the fact that Lackawanna County constitutes a judicial district with a president and an additional law judge. The adjudication does not suggest any reason why the term could not have been extended, and we assume that there was none. There was, therefore, no case of necessity presented by the facts stated in the adjudication, nor did the learned judge undertake to put a finding of such necessity upon the

record. The adjudication only asserts that **'the court is satisfied that it is useless to detain the jury longer,'** and then directs their discharge. This order was a mistake. It was made in disregard of the protest of the defendants. They were in jeopardy when the order was made, and its effect was to end the trial and the jeopardy without a verdict and without their consent. When they were again called upon to answer and subject themselves to the jeopardy of a trial, they had a right under the constitution to say, 'We have been once put in jeopardy for this crime and we cannot be compelled to undergo the same peril a second time for the same offense' This was the effect of their special plea and it was unanswerable *Peiffer* v. *Commonwealth*, 15 Pa., 468; *McFadden* v. *Commonwealth*, 105 Pa., 1; *Hilands* v. *Commonwealth*, 111 Pa., 1.

* * * * *

The judgment entered upon the demurrer was right, therefore, and it is now affirmed."

To the same effect is

Hilands v. *Commonwealth*, 111 Pa. Stat., 1.

Commonwealth v. *Cook*, 6 Sar. &. Rawle, 577.

Commonwealth v. *Clue*, 3 Rawle, 497.

KENTUCKY:

O'Brian v. *The Commonwealth*, 72 Ky., 333, 339.

Robinson v. *Commonwealth*, 88 Ky., 386.

ALABAMA:

McCauley v. *The State*, 26 Ala., 135.

Ex parte Vincent, 43 Ala., 402, cited *supra in extenso.*

Ned v. *State*, 7 Porter (Ala.), 187.

In the latter case the exact question here presented was before the court, and in passing upon that point the court

said, among other things, after reaffirming the decisions in Pennsylvania and adopting their rule and reasoning:

"The law declares that everyone shall be entitled to the benefit of a trial by jury, *and as long as they continue in health and capable of reasoning on his case he is entitled to the exercise of these powers.* Whenever, from exhaustion or any other cause, a juror becomes unable to exercise these functions and the fact is shown to the court to be such as must continue, then a case of necessity has occurred and the jury ought to be discharged." (p. 214.)

The court thereupon reversed the judgment of the lower court and discharged the prisoner.

TEXAS:

Powell v. *The State*, 17 Texas Court of Appeals, 345.

Wright v. *The State*, 15 S. W. Rep., 717.

From the evidence taken (by the court, in the absence of the jury) upon the defendant's offer to prove that he had once been in jeopardy, it appeared that the trial of the defendant began upon August 29, 1899, and that the jury retired on September 1, at the hour of about 4:30 in the afternoon. *It also appeared from the evidence that the court determined to discharge the jury before calling the jury in or ascertaining how they stood, or whether or not they could agree, in fact, that determination had been reached before the court even entered the court room*, that all the court had before him at the time of the discharge was the following colloquy between the court and the jury: "Have the jury arrived at a verdict or agreed upon a verdict?" to which the foreman replied, "We have not." The court thereupon asked the foreman, "Have you discussed the questions in the case among yourselves?" to which the foreman replied, "We have, your Honor";

that thereupon the court asked the foreman, "Do you think you can arrive at an agreement?" To which the foreman replied, "I believe not, your Honor;" and that thereupon the court asked the rest of the jurors the question, "Is that your opinion, or are you of that opinion?" To which no reply was made. There was no complaint made by the jurors, nor any request for a discharge by said jurors, and the jurors and court were physically in good health. (273)

The defendant called one of the jurors of the discharged jury for the purpose of showing the physical condition of the jurors at the time of the discharge and offered so to show, but that offer was refused. (276) To this evidence thus offered and introduced, the state interposed a demurrer, which demurrer was sustained and the defendant was not allowed to have this evidence considered by the jury.

If the court has the power arbitrarily and without any necessity therefor to discharge the jury by merely assuming that they are unable to agree, the protection which trial by jury is supposed to afford is entirely taken away, and an accused person may be placed in jeopardy as often as the whim of the trial judge shall be exercised to direct the jury to cease their consideration of the evidence and retire to their homes.

The practice in the Criminal Courts of Cook County has not conformed to the plain letter of the law. A failure to understand, or at least to observe, the principles which underlie the administration of criminal justice and secure the rights of accused persons has led to various acts and assumptions on the part of judges which violate the rules of practice and the law of the land.

This practice of discharging juries, when no necessity for such discharge existed, by a mere exercise of what is termed discretion, although of long standing, is none the less pernicious and dangerous, and "*to withhold the only remedy in such a case is to surrender to the lawless discretion of the judge the constitutional right of trial by jury.*"

———o———

Authorities seemingly opposed to this position and heretofore relied upon by the people, are the following:

Profit on Jury Trials, Sec. 490.

Section 491 states the rule that:

"The inference is that the necessity, whatever it may be, must appear upon the record, and it must be adjudged by the court *from proper evidence* that such necessity existed which made a discharge of the jury *imperatively necessary;* hence where it appeared that the necessity was not made apparent to the court and was not properly adjudged to exist and the jury were discharged it was held that this was sufficient as a plea of autrefois acquit on a future trial of the same indictment."

Windsor v. *The Queen*, 118 Eng. Com. Law Reps., 141, citing from page 143. On page 169, the court said:

"In a generation or two after he (Coke) wrote we find Lord Hale stating that where upon the trial the proof of the offense charged turned out to be defective it was a practice prevailing at Newgate and in most circuits of England to discharge the jury in order that the prosecution might come better prepared upon a future occasion, and we find that eminent lawyer as well as humane man speaking with approbation of this practice as tending to prevent the frustration of justice where evidence which might be forthcoming happened to be temporarily wanting; and he speaks of it as having prevailed for a long time. Afterwards in consequence of the abuse for the practice on political trials, and possibly in consideration

of the hardship on the accused, who being prepared for his defense on the first trial might want the means of his defense on the second, the judges, after consulting among themselves—for it does not appear there was any judicial decision on the point—adopted a different rule, viz: that on a trial for felony the jury should not be discharged at the discretion of the judge."

From a reading of this part of the citation it is perfectly apparent that the rule as contended for by Lord Hale was not that part of the common law, which was adopted under our constitution and statutes.

It has never been contended that after the beginning of the trial of a criminal case the court might discharge the jury because some evidence or all evidence was wanting on the part of the state.

On page 181 of the same authority the court said:

"In the present case it appears from the record that the trial began on Friday morning and was unexpectedly protracted. A few minutes before midnight on Saturday the jury, after five hours deliberation having stated that they were not likely to agree, the judge had to determine a most difficult question, viz, would a verdict returned on Sunday be lawful and right? I think that to sit judicially on a criminal trial on Sunday would be indecent and should not be done if it can be avoided. At any rate it is a matter of grave doubt whether a verdict recorded on Sunday would not be void in law, and therefore I never could say that it was not a proper exercise of judicial discretion in a judge to discharge the jury and so avoid raising that difficult question. It is said that he might have adjourned until Monday and ordered that the jury should have refreshment in the interval. But it is very doubtful whether a judge has power to adjourn a case after the jury have retired to consider their verdict, and it is also a doubtful question whether the having refreshment would not have vitiated their verdict."

It is perfectly apparent therefore, that the opinion in the above case was rendered with the evidence before

the court that it would have been impossible for the jury to have returned a verdict which would have been good in the case on Sunday, and the court therefore sought the lesser of two evils, and held that "the judge had to determine a most difficult question, viz: would a verdict returned on Sunday be lawful and right," and that "it is a matter of grave doubt whether a verdict recorded on Sunday would not be void in law," and therefore held that the discharge of the jury was not beyond the discretion of the court.

11 Am. & Eng., 950. The author there says:

"The discharge of the jury is the criminal case upon a valid indictment without the consent of the defendant not called for by *imperious necessity*, operates as an acquittal and bars a further trial. But where the discharge is *absolutely necessary* for the purposes of justice, no jeopardy attaches."

Dobbins v. *People*, 140 St., 493.

In that case the Supreme Court of Ohio said (502):

"For wise reasons no investgation is frequently permitted of what transpires in the consultations of the jury; and when they unanimously return their inability to agree it is conclusive of the fact that they have not agreed and may rightfully have its just weight in determining the question whether they are likely to do so. But as this must be mere matter of opinion in which they are often found mistaken it ought never to be permitted to take the place that the actual fact that they have deliberated so long has under all the circumstances attending it to convince the court that no agreement can be expected. When the court is so convinced and the facts are such as to justify the conviction, the order discharging may be made. But as this order may most materially affect the legal rights of the party, and as a discharge without sufficient reason is in effect an acquittal, it must appear from the record, to justify holding him to a further trial, *that the obstacle which the law will recognize as a*

necessity did in fact exist, that it engaged the attention of the judge, that his order was based thereon and was the result of consideration and decision. * * * But it is claimed by counsel for the state that this whole matter is one of pure discretion in the court where the trial is had. * * * We are of different opinion. It is one of the very clearest of the legal rights of the accused to require a verdict if one can be had, **and we know of no case in which any one can be deprived of his legal rights at the mere irresponsible discretion of a court."**

The Supreme Court of Ohio then reviewed the decisions of New York, which have also been relied upon by the People, and with reference to those authorities said:

"But the decision of that court (N. Y.) is undoubtedly placed upon the ground that it was a matter of discretion in the court below, and if the power had not been discreetly exercised there could be no remedy. This may be true in New York, but it is not true in Ohio."

This decision must be read in connection with Sec. 7313 of the Ohio Code, which provides that:

"The court may discharge a jury without prejudice to the prosecution for the sickness of a juror, the corruption of a juror, or other accident or calamity, or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal."

Notwithstanding this section of the statute, the Supreme Court of Ohio has held that:

"In such case the record must show the existence of the necessity which required the discharge of the jury. Otherwise the defendant will be exonerated from liability of further answering to the indictment."

Dobbins v. *State*, 14 O. St., 493.

Poage v. *State*, 3 O. St., 229.

Hurley v. *State*, 6 Ohio, 399.

U. S. v. *Coolidge*, 2 Gall. Reps., 363, a decision by Mr. Justice Story in a misdemeanor case, and the entire opinion of the court is as follows:

"The question is simply this: A party is on trial before a jury and a circumstance occurs which will occasion the total failure of justice if the trial proceed. Have the court in such an emergency power to withdraw a juror? It has been stated from the bar that in capital cases the court have not this power. But in a case in Foster's Crown Law, and in several other cases, it has been held that they have. In misdemeanors there is certainly a larger discretion, and until the cases just mentioned, capital trials were generally supposed to be excepted. It is now held that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow. Suppose that in the course of the trial the accused should be reduced to such situation as to be totally incapable of vindicating himself. Shall the trial proceed and he be condemned? Suppose a juror is taken suddenly ill and incapable of attending to the case. Shall the prisoner be acquitted? Suppose that this were a capital case and that in the course of the investigation it had clearly appeared that on Lee's testimony depended a conviction or an acquittal. Would it be reasonable that the case should proceed? Lee may perhaps during the term be willing to testify. Under these circumstances I am of opinion that the government is not bound to proceed, but that the case be suspended until the close of the term that we may see whether the witness will not consent to an examination."

We believe this authority requires no comment. It has never been contended in Illinois that a case may be nollied for the purpose of allowing the prosecution the opportunity to get the evidence necessary to convict the defendant. The court will bear in mind, however, that this decision is by Mr. Justice Story, in the State of Massachusetts. We will have occasion to refer to Mr. Justice Story's opinion in the *U. S.* v. *Perez*, 9 Wheat., 579, hereafter.

Barrett v. *The State*, 35 Ala., 406.

It is unnecessary to cite at length from that authority. In the concluding paragraph of the opinion the court said:

"We take occasion, however, to remarkthat it is much the more prudent and safe course for the circuit judges to protract the session of the court to the end of the term prescribed by law, where the duration of the term is fixed, unless some great and overruling necessity requires a different course, or unless the prisoner consents to the discharge of the jury, for it is an extremely delicate and hazardous thing for the court to interfere with the prisoner's chances for life or liberty by acting upon the apparent absence of any probability of an agreement by the jury."

In the case of *Ex parte Vincent*, 43 Ala., 402 (decided some years later), upon a *habeas corpus* proceeding, the prisoner was discharged for the reason that after the jury had been out three days and after the court had asked the jury whether they could agree and they stated that they could not possibly agree upon a verdict, and asked to be discharged, the court held that:

"This reason was not sufficient to authorize the judge presiding to discharge the jury without the consent of the defendant. He had gone to trial and submitted his case to the jury and was entitled to the whole term to have his case disposed of, unless some necessity intervened which rendered this impracticable or impossible. His rights were the same had there been no other case in court but his own. The jury were therefore improperly and illegally discharged. This was tantamount to an acquittal. Therefore the prosecution cannot be further maintained against the defendant in the court below. Our conclusion is that the prisoner, John Vincent, must be discharged from further prosecution on said indictment, or for the offense therein charged."

People v. *Harding*, 53 Mich., 481.

This authority is rendered in view of the 29th section

of the Constitution of Michigan, to be found on page 54 of the General Statutes of Michigan (Edition of 1882), which provides that:

"No person, after acquittal upon the merits, shall be tried for the same offense."

It is therefore readily seen that the Constitution of Michigan is entirely different from that of Illinois, which provides that no person shall twice be placed in jeopardy for the same offense. A man may be placed in jeopardy and is placed in jeopardy without having "an acquittal upon the merits." We therefore respectfully urge that, in view of the Constitution of Michigan, that this case is no precedent for the case at bar; and it will further be noticed that the case was squarely decided upon that provision of the Michigan Constitution (p. 484 of the Opinion).

U. S. v. *Perez*, 9 Wheat., 579.

The opinion is by Mr. Justice Story rendered in 1824, and we submit, it is very much like the opinion rendered by Mr. Justice Story in the 2 Gall. It covers two pages, cites no authorities and simply holds that:

"They (judges) are to exercise a certain discretion on the subject, and it is impossible to have defined, all the circumstances which would render it proper to interfere. To be sure the power ought to be used with the greatest caution under urgent circumstances and for very plain and obvious causes. * * * But after all they have the right to order the discharge, and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges under their oaths of office."

This decision came up from the District Court of New York which was controlled by the principles and procedure and criminal law of the State of New York as

stated and held by the Supreme Court of the United States in *U. S.* v. *Reed et al.*, 12 How., 366, and subsequent cases.

In the latter case, the court said:

"The courts of the United States were in these respects (referring to criminal procedure) to be governed by the laws of the several states. It would seem necessarily to follow that the same principles were to prevail throughout the trial and that they were to be governed in like manner in the ulterior proceedings after the jury was sworn where there was no law of Congress to the contrary."

Four years prior to the rendition of this decision, the Court of Appeals of New York had decided in the case of *People* v. *Goodwin*, 18 Johnson, 187, following the statute of the State of New York, that a juror might be discharged under the conditions mentioned in the statute, and therefore the decision in the 9 Wheat., simply followed that decision in the State of New York which was based upon that statute.

Section 428 of the Criminal Code of the State of New York (which is known as "Code of Criminal Procedure of the State of New York"), 170, provides that:

"After the jury have retired to consider of their verdict they can be discharged before they shall have agreed thereon, only in the following cases:

1. Upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together; or
2. When, after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or
3. When with the leave of the court the public prosecutor and the counsel for the defendant consent to such discharge."

Section 430 provides:

"In all cases where a jury are discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term."

People v. *Goodwin*, 18 John., 187,

followed this statute and is therefore no authority against our contention. It may, however, be interesting to read the language used by the court in that opinion to be found on page 204, as follows:

"Upon full consideration, I am of opinion that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of extreme and obsolute necessity. * * * And in the present case, considering the great length of time the jury had been out, that the period for which the court could legally sit was nearly terminated and that it was morally certain the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal."

State v. *Nelson*, 26 Ind., 366.

In connection with this case should be read the case of *State* v. *Leunig*, 42 Ind., 541, in which the court holds:

"The mere ruling or finding of the court that the ends of justice require the discharge of the jury will not of itself be sufficient to establish a necessity for their discharge, especiallly when the fact in the record show that no such necessity existed. The judge might find that the ends of justice required the discharge of the jury and the continuance of the cause in order that absent witnesses might be procured or for any other cause, when in fact there was no necessity for it. We do not think it necessary in this case to re-open the discussion of the question as to when and under what circumstances the jury may be discharged without its being equivialent to a verdict of not guilty. We are satisfied that in the case at bar there

was no necessity for discharging them, and that the court permitted no error in ordering the discharge of the prisoner."

Section 1828 of the Code of Criminal Procedure for the State of Indiana provides that the jury shall retire to consider their verdict in charge of an officer who shall, when the jury have agreed upon their verdict, "return them in to court (when so agreed) or when ordered by the court."

The distinction between that statute and of Illinois is apparent.

Lawrence v. *The People*, 1 Scam. (Ill.), 414.

The opinion in that case covers nine lines and simply holds that:

"The Circuit Court may set aside a defective verdict and award a venire, *de novo*, in a criminal case where the facts found are so defective that no judgment can be rendered upon said verdict."

This was upon a writ of error, and plaintiff in error does not contend otherwise.

State v. *Woodruff*, 2 Day (Conn.), 504.

This was a prosecution before a justice of the peace on the complaint of a grand jury for unlawfully voting in a town meeting of Durham. The entire opinion by the court is to be found on page 522, and is as follows:

"By the court unanimously. The judgment was reversed on the ground that the qualification required by a statute is the having a free hold estate actually rated in the common list at $9, but that having such estate ratable in the list at that sum is not sufficient."

There was a discussion in that case as to the right to discharge a jury unable to agree, but no opinion was given upon the question here at issue.

Even assuming, however, that that opinion makes against our contention (and we deny that fact there), is no provision in the Constitution of Connecticut that a person shall not be twice placed in jeopardy for the same offense.

State v. *Brooks*, 22 Tenn., 72.

We here quote the entire opinion of the court in this case:

"The prisoner was indicted in the Circuit Court of Hardin for the crime of murder. At the October, 1841, term he was put upon trial. The jury not being able to agree the case was continued from day to day until the last day when the court remained in session when they were discharged and a mistrial directed. It appears that this was the last order made by the court during the term except one allowing a bill of costs for the jury during the trial. * * * The business of the court being finished, and the time having arrived for a term to be held at another place, and disagreeing, the jury may be discharged and a mistrial entered without discharging the prisoner. * * * We don't think this act can affect the present case, because the record shows there was another court to be held; and of the necessity of an adjournment of the court at Hardin for the purpose of so doing the Circuit Court was alone competent to determine; and because the record showed that the mistrial had to be entered, because the jury could not agree upon a verdict." (And the court had to adjourn.)

State v. *Prince*, 63 N. C., 529.

If this case makes against our contention, it is controlled in express language by the case of *State* v. *Altman*, 64 N. C., 364, wherein the court held that a jury having retired to consider their verdict upon Saturday of the first week of the term at 8 o'clock P. M., and upon Monday of the second week at half past 5 P. M., having returned in to court, being unable to agree, the judge ordered a

juror to be withdrawn and the jury discharged. The court upon this state of facts held that the prisoner was placed in jeopardy and could not be tried again for the same offense. In conclusion the Supreme Court said:

"The case was committed to the jury on Saturday evening of the first week of the term, and the jury was discharged on the evening of Monday of the second week, after a deliberation of about forty-five hours. We do not think that the mere lapse of that space of time without an agreement by the jury can be, as we may suppose it to have been (although the fact is not stated), with their declaration that they probably could not ever agree was a sufficient cause for their discharge."

We therefore submit that the great weight of authority makes for the contention that defendant has twice been placed in jeopardy.

III.

THE JUDGMENT OF THE CRIMINAL COURT OF COOK COUNTY DIRECTING THE "WARDEN OR KEEPER OF SAID PENITENTIARY * * * TO TAKE THE BODY OF SAID DEFENDANT AND CONFINE HIM IN SAID PENITENTIARY * * * UNTIL DISCHARGED BY THE SAID BOARD OF PARDONS, AS AUTHORIZED AND DIRECTED BY LAW, PROVIDED SUCH TERM OF IMPRISONMENT IN SAID PENITENTIARY SHALL NOT EXCEED THE MAXIMUM TERM FOR THE CRIME FOR WHICH SAID DEFENDANT WAS CONVICTED AND SENTENCED."

The statute under which the defendant was tried (Sec. 215 of the Criminal Code of Illinois), and which is quoted in full, *supra*, provides that if any officer duly authorized by law to receive a fund

"shall fail or refuse to pay or deliver over the same when required by law, * * * he shall be imprisoned in the penitentiary not less than one nor more than ten years, * * * provided that no person shall be com-

mitted to the penitentiary under this act unless the money not paid over shall amount to one hundred dollars. * * * "

The verdict of the jury was that,

"We, the jury, find the defendant, Edward S. Dreyer, guilty of failure to pay over money, * * * and we fix the amount thereof to be $316,000, and we fix his punishment at imprisonment in the penitentiary."

The judgment of the court committing the defendant upon this verdicts directs

"the warden or keeper * * * to take the body of the said defendant, Edward S. Dreyer, and confine him in said penitentiary in safe and secure custody from and after the delivery thereof, until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced." (21, 22.)

It appears from said judgment order that the defendant

"is sentenced to the penitentiary of this state, at Joliet, for the crime of failure to pay over money." * * *

It will further appear that he is to be confined in the penitentiary until

"discharged by the State Board of Pardons, * * * not exceeding the maximum term for the crime for which the said defendant was convicted and sentenced."

There is no crime defined in the Criminal Code of Illinois by the term "failure to pay over money." The section of the statute under which the defendant was indicted, tried and convicted is entitled, "Withholding Funds." The judgment order does not find the amount which the defendant has withheld and hence, under the statute last above referred to (Sec. 215), Dreyer is not

to be committed to the penitentiary at all

"unless the money not paid over shall amount to one hundred dollars, or if it appears that such failure or refusal is occasioned by unavoidable loss or accident."

Who, therefore, is to determine what is

"the maximum term for the crime for which the said defendant was convicted and sentenced."

The judgment was entered in conformity with the law approved April 21, 1899, in Illinois, entitled: "An Act to revise the law in relation to the sentence and commitment of persons convicted of crime, and providing for a a system of parole. * * *"

The pertinent paragraphs of that act are as follows:

SENTENCE TO THE PENITENTIARY—TERM OF IMPRISONMENT.

1. "That every male person over twenty years of age, and every female person over eighteen years of age, who shall be convicted of a felony or other crime punishable by imprisonment in the penitentiary, except treason, murder, rape and kidnapping, shall be sentenced to the penitentiary, and the court imposing such sentence shall not fix the limit or duration of the same, but the term of such imprisonment shall not be less than **one year, nor shall it exceed the maximum term provided by law for the crime of which the prisoner was convicted, making allowance for good time,** as now provided by law."

DUTY OF THE PENITENTIARY COMMISSIONERS TO ADOPT RULES, ETC., RECEIPT OF PRISONERS, EXAMINATION OF, BOARD OF PARDONS, REGISTER TO BE KEPT.

2. "It shall be the duty of each board of penitentiary commissioners to adopt such rules concerning all prisoners committed to their custody as shall prevent them from returning to criminal courses, best secure their self-support, and accomplish their reformation. Whenever any prisoner shall be received into said penitentiary, the

warden shall cause to be entered in a register the date of such admission, the name, nativity, nationality, with such other facts as can be ascertained, of parentage, education, occupation and early social influences as seem to indicate the constitutionally and acquired defects and tendencies of the prisoner, and based upon these, an estimate of the present condition of the prisoner, and the best probable plan of treatment. And the physician of said penitentiary shall carefully examine each prisoner when received and shall enter into a register to be kept by him, the name, nationality or race, the weight, stature and family history of each prisoner, also a statement of the condition of the heart, lungs and other leading organs, the rate of the pulse and respiration, and the measurement of the chest and abdomen, and any existing disease or deformity, or other disability, acquired or inherited. Upon the warden's register shall be entered from time to time, minutes of, observed improvement or deterioration of character, and notes as to the method and treatment employed; also all alterations affecting the standing or situation of such prisoner, and any subsequent facts or personal history which may be brought officially to his knowledge bearing upon the question of the parole or final release of the prisoner; and it shall be the duty of the warden, or, in his absence, the deputy warden, of each penitentiary to attend each meeting of the board of pardons that is held at the penitentiary of which he is warden, for the purpose of examining prisoners as to their fitness for parole. He shall advise with said board of pardons concerning each case, and furnish said board of pardons with his opinion, in writing, as to the fitness of each prisoner for parole whose case said board may be considering. And it is hereby made the duty of every public officer to whom inquiry may be addressed by the clerk of the board of pardons, concerning any prisoner, to give said board all information possessed or accessible to him, which may throw light upon the question of the fitness of said prisoner to receive the benefits of parole."

WHEN PRSIONER SENTENCED—OFFICIAL STATEMENT OF JUDGE AND STATE'S ATTORNEY TO BE ATTACHED TO MITTIMUS.

3. "It shall be the duty of the judge before whom any prisoner is convicted, and also the state's attorney, of the county in which he is convicted, to furnish the board of penitentiary commissioners an official statement of the facts and circumstances constituting the crime whereof the prisoner was convicted, together with all other information accessible to them in regard to the career of the prisoner prior to the time of the commital of the crime of which he was convicted, relative to his habits, associates, disposition and reputation, and any other facts and circumstances which may tend to throw any light upon the question as to whether such prisoner is capable of again becoming a law-abiding citizen. It shall be the duty of the official reporter, at the direction of the judge of the said court or the state's attorney of said county, to write the official statements of the judge and state's attorney above referred to at the time of the conviction of the prisoner, and it shall be the duty of the clerk of the court to cause such official statements to be attached to the mittimus with the copy of the judgment of the court at the time of issuing the same, and deliver the same, so attached to the mittimus, to the sheriff of the county for transmission to the penitenitary, at the time of the delivery of the prisoner to the warden; and it shall be the duty of the warden to report to the board of pardons the receipt of such prisoner with such other official information as the board may require within five days after the receipt of such prisoner."

"4. The said **board of pardons shall have power to establish rules and regulations under which prisoners in the penitentiary may be allowed to go upon parole outside of the penitentiary building and enclosure.** *Provided*, that no prisoner shall be released from either penitentiary on parole until the state board of pardons, **or the warden of said penitentiary shall have made arrange-**

ments, or shall have satisfactory evidence, that arrangements have been made for his honorable and useful employment while upon parole, in some suitable occupation, and also for a proper and suitable home, free from criminal influences, and without expense to the state. *And provided*, further, that all prisoners so released upon parole shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the warden of the penitentiary from which they were paroled, and shall, during the said time, be considered as remaining under conviction for the crime of which they were convicted and sentenced **and subject at any time to be taken back within the enclosure of said penitentiary, and full power to enforce such rules and regulations, and to retake and reimprison any inmate so upon parole is hereby conferred upon the warden of said penitentiary**, whose order or writ certified by the clerk of said penitentiary, with the seal of the institution attached, and directed to all sheriffs, coroners, constables, police officers, or to any particular person named in said order or writ, shall be sufficient warrant for the officer or other person named therein to authorize said officer or person to arrest and deliver to the warden of said penitentiary the body of the conditionally released or paroled prisoner named in said writ, and it is hereby made the duty of all sheriffs, coroners, constables, police officers, or other persons named therein, to execute said order or writ the same as any other criminal process. **In case any prisoner so conditionally released or paroled shall flee beyond the limit of the state,** he may be returned, pursuant to the provisions of the law of this state relating to fugitives from justice. It shall be the duty of the warden, immediately upon the return of any conditionally released or paroled prisoner, to make report of the same to the state board of pardons, giving the reasons for the return of said paroled prisoner.

Provided, further, that the state board of pardons may, in its discretion, **permit any prisoner to temporarily and conditionally depart from such penitentiary on parole and go to some county in the state named and there remain within the limits of the county and not to**

depart from the same without written authority from said board, for such length of time as the board may determine, and upon the further condition that such prisoner shall, during the time of his parole, be and continuously remain a law abiding citizen of industrious and temperate habits, and report to the sheriff of the county on the first day of each month, giving a particular account of his conduct during the month, and it shall be the duty of such sheriff to investigate such report and ascertain what has been the habits and conduct of such prisoner during the time covered by such report and to transmit such report upon blanks furnished him by the warden of the penitentiary to said warden within five days after the receipt of such prisoner's report, adding to such report the sheriff's statement as to the truth of the report so made to him by the prisoner. It shall also be the duty of such sheriff to keep secret the fact that such prisoner is a paroled prisoner and in no case divulge such fact to any person or persons so long as said prisoner obeys the terms and conditions of his parole.

5. Upon the granting of a parole to any prisoner, the warden shall provide him with suitable clothing, ten dollars in money, which may be paid him in installments at the discretion of the warden, and shall procure transportation for him to the place of his employment, or to the county seat of the county to which he is paroled.

6. It shall be the duty of **the warden** to keep in communication, as far as possible, with all prisoners who are on parole from the penitentiary of which he is the warden, also with their employers, and when, **in his opinion any prisoner who has served not less than six months of his parole acceptably,** has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the **warden shall make certificate to that effect to the State Board of Pardons;** and whenever it shall be made to appear to the State Board of Pardons from the warden's report, or from other sources, that any prisoner has faithfully served the term of his parole, and the board shall be of the opinion that such prisoner can safely be trusted to be at liberty,

and that his final relief will not be incompatible with the welfare of society, **the State Board of Pardons shall have the power to cause to be entered of record in its office an order discharging such prisoner for, or on account of his conviction, which said order, when approved by the governor,** shall operate as a complete discharge of such prisoner, in the nature of a release or commutation of his sentence to take effect immediately upon the delivery of a certified copy thereof to the prisoner, and the clerk of the court in which the prisoner was convicted shall, upon presentation of such certified copy, enter the judgment of such conviction satisfied and released pursuant to said order. It is hereby made the duty of the clerk of the board of pardons to send written notice of the fact to the warden of the penitentiary of the proper district, whenever any prisoner on parole is finally released by said board."

Article 3 of the Constitution of Illinois of 1870 (Hurd's Rev. Stat. Illinois, 55), provides:

"The powers of the government of this state are divided into three distinct departments, legislative, executive and judicial; and no person or collection of persons being one of these departments shall exercise any power belonging to either of the others except as hereinafter expressly directed or permitted."

Section 1 of article 6 of the same constitution (p. 53), provides that:

"The judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, Circuit Courts, County Courts, Justices of the Peace, Police Magistrates, and such courts as may be created by the law in and for cities and incorporated towns." (Hurd's Rev. Stat., 63.)

Section 13 of article 5 of the constitution provides that the pardoning power shall be in the governor of the state. (Hurd's Rev. Stat. of Ill., 61.)

The act of April 21, 1899, above quoted, is a revision of the act entitled "Parole System," which was "An Act

in relation to the sentencing of persons convicted of crime, and providing for a system of parole," approved June 15, 1895, and to be found in the Laws of Illinois of 1895, p. 115 *et seq.* The pertinent part of both of these acts, and especially the parts here complained of, as being unconstitutional, and depriving the defendant of his liberty without due process of law, are identical.

The act of 1895 has received the judicial sanction of the Supreme Court of Illinois in *George* v. *The People*, 167 Ill., 447, which case will be hereinafter more fully referred to.

THE ACT TO REVISE THE LAW IN RELATION TO THE SENTENCE AND COMMITTMENT OF PERSONS * * * PASSED APRIL 21, 1899.

The act in question first provides that the prisoner shall be sentenced to the penitentiary for no definite term, but that his term

"shall not be less than one year, and shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted, making allowance for good time, as now provided by law." (Hurd's Rev. Stat., 669.)

The judgment in question does not fix any minimum term, but only provides that the defendant "shall not be imprisoned to exceed the maximum term for the crime for which the said defendant was convicted and sentenced. (21, 22.) Assuming that the warden of the penitentiary is capable of ascertaining and determining what the punishment for the crime of failure to pay over money may be (or whether the amount so not paid over exceeds $100), as fixed by the statute, there is still no provision in the judgment order that will enable the warden to give

to the defendant the allowances provided under this law and other laws for "good time."

Under the statute creating and defining the offense of withholding money, the defendant may be guilty of a misdemeanor only (if the amount of money should be less than $100), and hence his punishment would be by imprisonment in the county jail, or fine, or both. The defendant would still be guilty of the offense created, notwithstanding the amount of money was less than $100, hence the warden must necessarily exercise a judicial power in determining, first, for what crime the defendant has been convicted, and, second, what is the maximum punishment for that crime.

The Supreme Court of the State of Illinois is committed to the doctrine that any law that grants judicial power to any person, persons or body, other than the parties designated in the constitution, is unconstitutional.

In *People ex rel. Kern* v. *Chase, supra,* 165 Ill., 527, the Supreme Court of Illinois had occasion to pass upon the constitutionality of what is known as the Torrens Law. In determining the powers of the registrar, with reference to land titles, that court said (p. 538 of opinion):

"Whether the principal thing to be determined by them be the ownership of the land, or merely whether it shall be brought under the provisions of this act, or only when the statute of limitations shall begin to run, it seems clear that the adjudication **is upon the rights of the parties claiming as owners, by construing and applying the law to the facts of the case.** The definition of judicial power given by Judge Cooley in his work on Constitutional Limitations, held by this court to be sufficiently accurate for the purposes of the question then before the court, which was, in substance, the same as that now under consideration, is as follows: '*The power which adjudicates upon and protects the rights and interests of*

individual citizens, and to that end construes and applies the laws.' (*Owners of Lands* v. *People ex rel.*, 113 Ill., 296.) We do not understand that under this definition or under any definition of the term 'judicial powers' it is necessary that the adjudication between the parties shall be conclusive of their rights put in issue: but if the party or officer is clothed with the power of adjudicating upon and protecting the rights or interests of contesting parties, **and that adjudication infects any of the rights or interests of the parties, though not finally determining the rights, it is still a judicial proceeding or the exercise of judicial functions.** The question, therefore, in the supposed case is, not whether the registrar finally determines the ownership of the lot, but whether his decision affects the rights of the parties claiming that ownership."

The act which is thus passed upon is to be found in the Laws of Illinois of 1895, at page 107. The conclusion of the court upon the act is that it vested judicial power in the registrar, and is, therefore, unconstitutional.

In *Hoagland* v. *Creed*, 81 Ill., 506, the court held that judicial power can only be vested, under the Constitution of Illinois, in the manner therein provided.

Section 4 of the "parol system" provides for the allowing to a prisoner

"to go upon parol outside of the penitentiary building, and enclosure, provided that no prisoner shall be released from either penitentiary on parol until the State Board of Pardons or the warden of said penitentiary shall have made arrangements, or shall have satisfactory evidence that arrangements have been made, for his honorable and useful employment while upon parole, in some suitable occupation. * * * And provided, further, that all prisoners, so temporarily released upon parole, shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the warden of the penitentiary. * * * In case any prisoner so conditionally released or parolled shall flee beyond the

limit of the state, he may be returned pursuant to the provisions of the law of this state relating to fugitives from justice."

Section 6 of that act provides that:

"any prisoner who has served not less than six months of his parole acceptably, has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the warden shall make certificate to that effect to the State Board of Pardons. And whenever it shall be made to appear to the satisfaction of the State Board of Pardons from the warden's reports or from other sources, that any prisoner has faithfully served the term of his parole, and the board shall be of the opinion that such prisoner can safely be trusted to be at liberty, and that his final release will not be incompatible with the welfare of society, the State Board of Pardons shall have the power to cause to be entered of record in its office, an order discharging such prisoner for, or on account of his conviction, which said order, when approved by the Governor, shall operate as a complete discharge of such prisoner to take effect immediately upon the delivery of a certified copy thereof to the prisoner, and the clerk of the court in which the prisoner was convicted shall, upon presentation of such certified copy, enter the judgment of such conviction satisfied and released pursuant to said order. It is hereby made the duty of the clerk of the board of pardons to send written notice of the fact to the warden of the penitentiary of the proper district, whenever any prisoner on parole is finally released by said board."

Under sections 4 and 6 it will be noticed that

1st. Any moment after the prisoner has been confined in the penitentiary and has begun to serve his sentence the State Board of Pardons may give complete liberty to such favored prisoner. Thus, in the case of extending the parole, limiting or shortening the sentence for the crime for which the prisoner is convicted and in case the parole is refused, extending the term of the prisoner not

favored beyond the term fixed for the favored prisoner convicted for the same offense under the same conditions and circumstances.

2nd. A temporary order "discharging such prisoner for or on account of his conviction" by the State Board of Pardons, which said order, when approved by the Governor, shall operate as a complete discharge of such prisoner, in the nature of a release or commutation of his sentence.

Section 6 of the act above referred to does not vest the pardoning power in the State Board of Pardons and does not divest the Governor of pardoning power vested in him under the constitution. If the Governor should fail to approve the order of discharge mentioned in section 6, the effect, so far as the favored prisoner is concerned, is the same, because no matter what act might be committed by the prisoner so paroled, the board of pardons might refuse to re-take such prisoner into custody.

It cannot be seriously argued that this act does not vest any judicial authority in such board and endow it with power to inflict punishment unequally among violators of the law, contrary to due process of law as prescribed by the Constitution of the United States.

In *George* v. *People, supra,* the Supreme Court of Illinois held the law to be constitutional for the reason that the acts of the State Board of Pardons were merely ministerial. The authorities cited in support of this proposition by that court are no aid to a determination of this question. We contend that the fixing of the period of the sentence and committment of the prisoner is not a ministerial but a judicial act.

In American & English Ency. of Law, Vol. 12, p. 59, the author says:

"A judgment is the decision or *sentence* of the law, pronounced by a court or other competent tribunal in a proceeding therein."

To the same effect, see:

Blackstone's Com., Vol. 3, p, 395.
Blood v. *Bates*, 31 Vt., 150.
Co. Litt., 39 a.
Davidson v. *Smith*, 1 Biss. (U. S.), 351.
Zeigler v. *Vance*, 3 Iowa, 530.

In Amer. & Eng. Ency. of Law, Vol. 21, p. 1066, the author says:

"A sentence is the final determination of a criminal court, the conclusion of law formally pronounced by a criminal court, declaring the consequences to a defendant of the fact of guilt, confessed or ascertained by verdict."

Commonwealth v *Lockwood*, 109 Mass., 323.
Arcia v. *State*, 26 Tex. App., 193.

In *People* v. *Cummings*, 88 Mich., 249, the Supreme Court of Michigan had occasion to pass upon the constitutionality of an act containing each and every of the material provisions of the parole act here in question.

That act was entitled, and is as follows:

"An Act to provide for intermediate sentences, and disposition, management and release of criminals under such sentence.

Section 1. *The People of the State of Michigan enact*, That every sentence to state prison at Jackson, the State House of Correction and Reformatory at Ionia, and the State House of Correction and Branch of the state prison in the Upper Peninsular, of any person hereafter convicted of a crime, except of a person sentenced for life,

or a child under fifteen years of age, may be in the discretion of the court, a general sentence of imprisonment in that one of the prisons provided by law for the offense of which he is convicted. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced; and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which he is convicted.

Sec. 2. Every clerk of any court by which a criminal shall be sentenced to any prison, whenever the term of such sentence may not be fixed by the court, shall furnish the warden or other officer having such criminal in charge a record containing a copy of the information or complaint, of any special plea, the name and residence of the judge presiding at the trial, also of the jurors and of the witnesses sworn on the trial, with a statement of any fact or facts which the presiding judge may deem important or necessary for the full comprehension of the case, and of his reasons for the sentence inflicted; and such copy, statement and abstract, signed by the clerk of the court, shall be *prima facie* evidence against the convicted person in all proceedings for the relief of such person by a writ of habeas corpus or otherwise. The clerk of the court shall be entitled to such compensation in every case in which he shall perform the duties required by this act as shall be certified to be just by the presiding judge at the trial, and shall be paid by the county in which the trial is had, as a part of the court expenses. The clerk shall also, upon any conviction and sentence, forthwith transmit to the warden of the prison to which sentenced notice thereof.

Sec. 3. The Board of Control of prisons shall have power to establish rules and regulations under which prisoners sentenced under this act may be allowed to go upon parole outside of the buildings and inclosures, but to remain, while on parole, in the legal custody and under the control of the board, and subject at any time to be taken back within the inclosure of said prison; and full

power to enforce such rules and regulations, and to retake and reimprison any convict so upon parole, is hereby conferred upon said board, whose written order, by its clerk, shall be sufficient warrant for all officers named therein, to authorize such officer to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute such order the same as in any ordinary criminal process.

"Sec. 4. The board shall make such rules and regulations for the separation and classification of prisoners sentenced under this act into different grades, with promotion and degredation, according to the merits of the prisoners, their employment and instruction in industry, and generally, as may from time to time appear to be necessary or promotive of the purposes of this act.

"Sec. 5. And it is hereby provided that when any prisoner violating the conditions of his parole or conditional release (by whatever name) is, by a formal order, entered in the board's proceedings, declared a delinquent, he shall thereafter be treated as an escaped prisoner owing service to the state, and shall be liable, when arrested, to serve out the unexpired period of the maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of the time served; and any prisoner at large upon parole or conditional release, committing a fresh crime, and, upon conviction thereof, being sentenced anew to the prison, shall be subject to serve the several sentence after the first sentence is served or annulled, to commence from the date of the termination of the first sentence.

"Sec. 6. Nothing in this act contained shall be construed to impair the power to grant a pardon or commutation in any case."

In passing upon the validity of this law, the court said:

"It is not clear, from the reading of this statute whether the board of control is given the power of absolute discharge from imprisonment or not. If so, it would be clearly unconstitutional, as the exercise of such power

would certainly involve one of two things, and perhaps both. It would be the exercise of judicial power in determining the term of imprisonment of a citizen, or an act of grace, to wit, the bestowing of a pardon and release of a prisoner before his term of imprisonment had expired. The judicial power of this state, by the constitution, is vested in certain specified courts (section 1, art. 6), and the pardoning power is vested absolutely (p. 252) in the Governor of the state. (Section 11, art. 5.) * * *

Yet if it be considered that the only power conferred is a conditional release upon parole, still, if the prisoner keeps his parole, or, rather, if the board are of the opinion that he does, the release is in fact an absolute one. By what refinement of reasoning it can be made to appear that this is not in effect a pardon of the prisoner, is beyond my comprehension. And, in my opinion, this act also confers upon the board judicial power. The term of imprisonment is fixed by the board, and not by the court. The sentence is to confinement in the prison generally,—no term is fixed by the judge. How long that term will be rests entirely in the will of the board. It may be one day or fifteen years, as they see fit, in some cases.

"It is in the power of the Legislature to fix all punishment for crime, and to provide for a minimum and maximum punishment, and to give the courts in which the prisoners are convicted a discretion to fix a term between these limits; but it cannot be contended for a moment that this discretion can be given to any other person or persons. **To do so would imperil the liberties of the citizen by putting his punishment for wrongs** (*p. 253) **committed into the arbitrary power of unauthorized persons, without any right or remedy in the courts.** Nor can the Legislature authorize a circuit judge to delegate his power and discretion in such a case to any other person or persons than himself. Under this act the general sentence, without interference from other parties, must stand for the length of time fixed by the maximum term. The court imposing this sentence has no discretion. It may be truly said that he has a discretion in the first place as to whether he will sentence under the act or not. But this discretion is whether

he will delegate his power and authority in the premises to the board of control or not, and we are now dealing with a case where he has exercised this first discretion.

It is said that this act 'is evidently promoted by a desire to reform, as well as to punish; to make better those under sentence, as well as to protect society.' Let us see how it will work in the interest of reform, and what will be the discretion of the trial judge—the one person best calculated, from his knowledge of all the incidents and circumstances of the commission of the crime and of the character of the prisoner, to exercise a discretion in fixing the term of imprisonment. Take, for instance, a person convicted of manslaughter. The maximum penalty is imprisonment in the state prison for fifteen years, the minimum a fine not exceeding $1,000; the sentence may be one day's imprisonment, it may be a fine of one cent. If the crime appears to be somewhat of an aggravated character, and the prisoner a bad man and an old offender, the circuit judge may reason, 'There is no hope of reforming this man, so I will sentence him to ten years in state prison.' At the end of ten years the prisoner is released unconditionally. In another case the nature of the crime may be such that the circuit judge may think that the prisoner ought not to be let off with a fine, but deserves imprisonment; but there is hope for reform, and he therefore concludes to sentence him under the indeterminate law. The moment he pronounces this sentence the term of imprisonment is entirely, not only at the discretion of the board of control but at their will and pleasure. No court can review their action. They may discharge him the next day after he arrives at the prison, but, worse than this, they may keep him confined for fifteen years. If the board are honest men, the term of imprisonment depends on his behavior after he enters the prison. If they are not honest, it depends solely on their will. When the convict, in whose interest so-called humanitarians have devised this matter of indeterminate sentence for his reform, enters the prison, he becomes the servant and slave of the prison board, and no court in the country has any power to protect his rights or redress his wrongs.

Their discretion is not reviewable by the courts; it is arbitrary."

* * * * *

(p. 255.)

"But it is claimed that the pardoning power is not granted to the board of control by this statute, because there is no authority to discharge prisoners absolutely conferred upon the board. It is argued that the power granted by this act is only to permit prisoners sentenced under it to go upon parole in the legal custody and control of the board, subject at any time to be taken back within the enclosure of the prison. If this be so, what is meant by this parole, and what is the power of the board? *Can they let one man out, not to go beyond a five mile limit, another to keep within the county where the prison is located, the third to keep within the congressional district, the fourth not to go outside the state, the fifth to keep himself within the limits of certain states of the Union, the sixth not to leave the United States, and the seventh not to visit England, and the others confined to certain localities, at the will and pleasure of this board*? Or does the law contemplate that this parole shall be in fact a release from prison with only the condition that the board may bring the person on parole back again if they see fit, and make him serve his whole unexpired maximum term within the prison walls? In any event, this parole system is as obnoxious to the constitution as an unconditional release by the board would be; and, if they have the power to release on conditions, these conditions may be made so trifling, as in fact to be no conditions at all."

* * * * *

(p. 259.) "Any convict thus released on parole can at any time be brought pack into the prison upon the written order of the board, which all officers must obey. All that is necessary is for the board to enter a formal order that the convict is a delinquent—has violated the conditions of his parole—and that is the end of it. The convict is not to have a hearing, and no court has power to interfere in his behalf, if this law is constitutional. Nor is this all, he is to be treated thereafter as an escaped

prisoner, owing service to the state, and loses the time even that he has earned by keeping the conditions of his parole perhaps for years; and if he commits another crime while he is at large upon his parole and is convicted thereof, his new sentence is deferred until he has served out his old, meting out to him double punishment for his last crime.

I have not sufficient words at my command to use in condemnation of this statute. It would fill our state with convicts—they could not be called freemen—running at large outside of our prison walls, all liable at any moment to be taken back inside at the will of four individuals, no better, probably in their impulses and caprices than the average man. These people thus at large would not only be subject to the will and pleasure of their masters, without hope of redress if wronged by them, but they would be out of prison under various conditions, and such as the board might impose upon them without regulation or restriction from any other power or authority—one under the condition that he shall drink no (p. 260) intoxicating liquor, and another that he shall not chew tobacco, and still another that he shall not use opium or drink strong coffee. There is no limit or qualification to the conditions that may be imposed."

"In looking upon this law, it is difficult to see in what respect this system of parole differs from a pardon by the Governor upon conditions. Is it not in fact a pardon—a release upon conditions? If it is not, if the faith of the board of control is not to be kept, and the convict has no certainty that if he keeps the conditions he will not be again imprisoned, then the whole scheme is a delusion and a snare, and unworthy a place upon the statute books. But, as it is, the only guaranty of a person so released of such good faith is the pleasure of the board."

* * * * *

"It is a wonder to me that such a law as this, giving such unheard of power to four men, not elected by the people, but holding their offices by appointment, could have been enacted in view of our constitution, and the whole theory of our state government, and in the light and example of the history of the establishment and growth of constitutional liberty in this country."

This court in *Medley, Petitioner*, 134 U. S., 160, clearly indicated how opposed it was to any law vesting in non-judicial officers judicial functions by discharging on *habeas corpus* a prisoner sentenced for murder, one of the grounds being that the law under which he was sentenced vested the sole power of fixing the time for execution "within one week" in the warden of the penitentiary, and commented upon that fact as follows:

"Nor can we withold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer appointed to execute it had a right to select the time of *the day* when it should be done, *this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer*, and is a departure from the law as it existed at the time the offense was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment."

The effect of the law in question and the power vested in the warden, board of pardons, board of prisoner inspectors, or parole board, has been passed on in *Commonwealth ex rel.* v. *Halloway*, 42 Pa. St., 446, 448, as follows:

"But a majority of us think the act is unconstitutional as interfering with judgments of the judiciary. The whole judicial power of the commonwealth is vested in courts. Not a fragment of it belongs to the legislature. **The trial, conviction and sentencing of criminals are judicial duties, part of a judicial judgment in a criminal court record.** Can it be reserved or modified by a board of

prison inspectors acting under legislative authority? If it can, what judicial decree is not exposed to legislative modifications? From what judicial sentence may not the legislature direct 'deductions' to be made if this act be constitutional? What they may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions?"

Likewise has it been passed on at *nisi prius* in Illinois in *People, ex rel.* v. *Allen*, 19 Chicago Legal News, 176, as follows:

"Under the act in question the duration of imprisonment of the offender is not measured by the mitigation or aggravation of the circumstances surrounding the commission of the crime, **but is to be determined by the subsequent conduct of the convict—that is, whether his subsequent conduct may appeal to the humanity or arouse the resentment of his keeper.** Men in authority are not always blessed with the greatest share of humanity, and where is the human being who would always remain tractable and docile under the lash of the taskmaster?

Why should the man who breaks and enters a bakery to procure a loaf of bread to appease the hunger of his wife and little ones be subjected to the same term of punishment meted out to the burglar who breaks and enters a dwelling house in the dead of the night? The former haunted with specter of wife and children left to the cold charity of a heartless world would probably remain morose and resentful to his keeper during the full term of twenty years, while the latter would become a fawning sycophant, securing the good graces and commendation of those in authority so as to secure his release after the year of service. To so construe the law would be repugnant to humanity, would be in direct conflict with the constitution, and contrary to the spirit and genius of our institutions.

If the jury should be actuated by malice or influenced by public opinion in fixing the duration of imprisonment, the court has the power to re-examine the case and cor-

rect the abuse, so that the judicial power of the court is never surrendered to the jury. Such is not the case with respect to the warden and prison commissioners under the law in question. **The duration of the imprisonment of convicts, which, as we have seen, is a judicial power, is vested in those officials, and their action is not reviewable by any tribunal on earth.** As I am answerable to my own conscience for my official acts, I can never lend my sanction to such an inhuman, and to my mind, monstrous proposition."

Conclusion.

As hereinbefore pointed out, the defendant is convicted, sentenced and now imprisoned for a claimed technical violation of the criminal statute of Illinois for failing to pay over moneys to his successor in office, the failure being occasioned solely and entirely by circumstances beyond his reach, which moneys prior to the final conviction of the defendant had been repaid.

We respectfully submit that upon the points relied upon and under the authorities cited, the defendant is being deprived of his liberty without due process of law, in violation of the constitution of the United States and that the judgment complained of should be reversed and set aside.

Levy Mayer,
Attorney for Plaintiff in Error.

No. 4213

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Dreyer v. Moran, et al.

For IN THE

Supreme Court of the United States.

Filed April 18, 1902.

No. [illegible]

OCTOBER TERM, A. D. 1901.

EDWARD S. DREYER,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

REPLY BRIEF AND ARGUMENT IN BEHALF OF PLAINTIFF IN ERROR.

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In plaintiff in error's brief, three points were presented for this court's consideration, as follows:

I.

THE OMISSION TO SWEAR THE BAILIFFS IN THE MANNER PRESCRIBED BY THE COMMON LAW AND THE STATUTES OF THE STATE OF ILLINOIS BEFORE THE JURY RETIRED TO CONSIDER OF THEIR VERDICT.

II.

THE DISCHARGE OF THE JURY ON THE FIRST TRIAL UNDER CIRCUMSTANCES IN THE CASE AT BAR.

III.

THE JUDGMENT OF THE CRIMINAL COURT OF COOK COUNTY, DIRECTING "THE WARDEN OR KEEPER OF SAID PENITENTIARY * * * TO TAKE THE BODY OF SAID DEFENDANT AND CONFINE HIM IN SAID PENITENTIARY * * * UNTIL DISCHARGED BY THE STATE BOARD OF PARDONS, AS AUTHORIZED AND DIRECTED BY LAW, PROVIDED SUCH TERM OF IMPRISONMENT IN SAID PENITENTIARY SHALL NOT EXCEED THE MAXIMUM TERM FOR THE CRIME FOR WHICH SAID DEFENDANT WAS CONVICTED AND SENTENCED."

We present the last point first for this court's consideration:

III.

THE JUDGMENT OF THE CRIMINAL COURT OF COOK COUNTY DIRECTING THE "WARDEN OR KEEPER OF SAID PENITENTIARY * * * TO TAKE THE BODY OF SAID DEFENDANT AND CONFINE HIM IN SAID PENITENTIARY * * * UNTIL DISCHARGED BY THE SAID BOARD OF PARDONS, AS AUTHORIZED AND DIRECTED BY LAW, PROVIDED SUCH TERM OF IMPRISONMENT IN SAID PENITENTIARY SHALL NOT EXCEED THE MAXIMUM TERM FOR THE CRIME FOR WHICH SAID DEFENDANT WAS CONVICTED AND SENTENCED."

No argument is advanced by defendants in error in support of the validity of the act under which the judgment in the case at bar was entered, other than the citation of the following cases:

George v. *The People*, 167 Ill., 447.
Conlon's Case, 148 Mass., 168.
Com. v. *Brown*, 167 Mass., 144, 146.
Oliver v. *Oliver*, 169 Mass., 592.
Com. v. *Crowley*, 168 Mass., 121.
Murphy v. *Com.* (Mass.), 43 L. R. A., 154.
Miller v. *State* (Ind.), 40 L. R. A., 109.
State v. *Peters*, 43 O. St., 629.

We admit that *George* v. *People, supra* (opinion by a divided court), passed upon the constitutionality of the law here in question (it being identical in its material provisions with the law of 1895). A large part of the opinion in the George case is devoted to the argument that the authority vested in the State Board of Pardons is not judicial, but is "what may be regarded as ministerial functions." (459.)

The cases cited by the Supreme Court of Illinois in support of this proposition (in *George* v. *The People*) are not in point and do not support the conclusion of the court.

These cases are to the effect:

That assessors valuing property for taxation, do not usurp judicial powers.

Porter v. *R. R. & S. Co.*, 76 Ill., 561.

That a decision of a board of supervisors that a bridge at a particular point is a necessity, is not the exercise of judicial powers.

People v. *Supervisors*, 47 Ill., 256.

That a report of the commissioners on a special assessment is not the vesting of a judicial power.

Wright v. *City of Chicago*, 48 Ill., 285.

As to the acts of commissioners whose duties were for the assessment of damages against property with reference to special assessments, etc., the Supreme Court of Illinois, says:

"The acts of the commissioners may therefore be considered as ministerial and not judicial. **They are the means by which the proceedings are initiated and the cause brought before the court, and for that purpose are valid.**"

Rich v. *City of Chicago*, 59 Ill., 286, 295.

In the last case upon the subject in Illinois, where a so-called ministerial body undertook to pass upon a substantial right of a person, even though it did not finally determine such right, that court held it was a judicial proceeding, and that the statute granting such power was unconstitutional.

People ex rel. Kern v. *Chase*, 165 Ill., 527.

In the George case, the court properly holds that:

"At common law the jury returned a verdict of guilty or not guilty, and the punishment was fixed by the court, and governed by the laws in force."

No one will contend that the passing of sentence by the court, after the finding of guilty by the jury, is not a judicial act. The passing of sentence and fixing the punishment has always been considered a judicial act. Under the law as it now stands, it is provided that the court shall not fix the punishment or the term of sentence. That judicial function, by the act in question, is now vested in the State Board of Pardons. The doctrine is universally affirmed that courts being a co-ordinate branch of the government are not, within their sphere, subject to legislative control.

Cooley's Constitutional Limitations, 113–115, 6th Edn.

Under the law in question, the court trying a defendant, is not permitted to decide, in its judgment, and under the circumstances in the particular case, what punishment should be inflicted, or what term of imprisonment should be imposed within the limitations provided by law. The court bases the argument that there is no exercise of judicial power in the act in question, vested in the State Board of Pardons, by reason of the fact that the pardoning power still remains in the governor. It is not contended that the pardoning power is a judicial act, and we admit that the technical right of pardon remains in the governor. The judicial power is put in

force by the act of the board in paroling the prisoner, thereby giving him his liberty in every particular, subject to recall under certain conditions, which conditions need never be invoked, and which conditions when invoked, are not subject to judicial review, and under which parole, whether his pardon be signed by the governor or not, the sentence of the paroled prisoner is shortened to such period as the State Board of Pardons may arbitrarily determine.

There is no provision in the statute in question which makes the parole of a prisoner under like circumstances and with equally as good behavior, mandatory upon the board; on the contrary, the exercise of parole power is not subject to review by any court under any conditions.

It is argued, however, that under the law in question, every sentence is now for the *maximum* term as provided by the statute defining the crime, and that if that term is shortened by the board, it is to the advantage and benefit of the defendant, and therefore he cannot complain.

If this be so, then the court passing judgment responds to the command of the statute, and not under the circumstances in each particular case to the dictates of his own judgment as to what the term of imprisonment should be within the limitations provided by the statute. That part of the power to judge is now immediately after sentence, vested in the Board of Pardons. That this was not the intention of the legislature is perfectly plain for instead of saying

"that the term of such imprisonment shall not be less than one year nor shall it exceed the maximum term provided by law" (Sec. 498).

it would have omitted the minimum of one year and simply provided that the punishment should not exceed the maximum term.

The clear meaning therefore, is that the sentence should be

some time more than one year and not exceed the maximum term, such time to be finally determined by the Board of Pardons. This is substituting for the judgment of the court trying the case, the judgment of the administrative officers appointed to carry out the sentence. 'Such an interpretation of the act seems to be a plain invasion of the functions of the judiciary.'

Authorities Relied on in Support of the Law

Conlon's case, 148 Mass., 168.

This case does not pass upon a law similar to the one now under consideration. In that case the defendant was sentenced to nine years imprisonment in the state penitentiary. Prior to the expiration of his sentence he was removed to the Concord Reformatory. On December 24, 1885, prior to the expiration of his sentence he received a permit to be at liberty

"issued with the approval of the governor and council"

which permit was subsequently revoked. The most that can be said of the case is that the governor of Massachusetts granted a pardon with conditions, which procedure has been upheld by this court in *ex parte Wells*, 18 Howard, 307, 315.

Commonwealth v. *Brown*, 167 Mass., 144.

The entire opinion of the court upon the question here under consideration is to be found at page 146, and is as follows:

"It is suggested again **without argument** that St. 1895, c. 504, under which the defendant was sentenced, is unconstitutional. This statute requires the sentence in certain cases to be for a term of not less than two and one-half years, **and not more than a maximum fixed by the court**, and not longer than the longest term fixed for the punishment of the offense. Such a sentence is in effect a sentence for the maximum **fixed by the**

court, unless a permit to be at liberty is issued as provided by Sec. 2. But the form of the sentence is made to recognize and carry out a policy familiar to our legislation and acted on heretofore without question. Pub. Sts., c. 222, Sec. 20. St. 1884, c. 255, Sec. 33. *Conlon's case*, 148 Mass., 168. Such a form of sentence does not make the punishment more severe than it otherwise would have been, and we see no reason why the law should not be construed to apply to all sentences, in the cases referred to, passed after the act goes into operation."

The reason, perhaps, that that court did not go into a consideration of the questions here raised may be found in its comment that:

"It is suggested that this statute is unconstitutional. No reason is offered for the suggestion."

Furthermore, the court there exercised the judicial power by fixing the maximum penalty in each case.

Oliver v. *Oliver*, 169 Mass., 542.

This was a libel for divorce. The constitutionality of indeterminate sentences was not involved. The only discussion on the subject is to the effect that,

"It is not to be presumed that the legislature, in adopting a system of indeterminate sentences for convicts in the state prisons, intends to change the rights of persons under the law relating to divorces. In our opinion those rights will be preserved by treating their sentences as in effect during the maximum term rather than only during the minimum term. * * * If injustice is done to libelees under the construction which we give to the statute, the legislature can easily furnish a remedy." (594.)

Commonwealth v. *Crowely*, 168 Mass., 121.

There is not a single word in the opinion in this case with reference to the validity of any statute or sentence of the kind involved in the case at bar. The entire opinion is with reference to certain evidence and a discussion of errors had upon the trial of the case.

Murphy v. *Commonwealth*, 172 Mass., 264; s. c. 43 L. R. A., 154.

The error assigned was that the sentence and committment pursuant to it, were wholly unauthorized and void, because the statute under which the sentence was imposed was *ex post facto*. It is true that in that case the court had occasion to pass upon *an* indeterminate sentence law, but it was considered and passed upon in that case upon the theory that

"The commonwealth contends that the provisions are in the nature of prison discipline, or of penal administration, or of criminal procedure." * * * (157.)

The only question there determined was that

"In no just sense can it be said, we think, that the duration of a sentence is uncertain, or that the determination of the term of imprisonment is taken from the courts, where it belongs, and left to prison commissioners." (159.) (Citing the Illinois cases.)

The language of the court in this case is *obiter* for the reason that it reversed the case with instructions to enter sentence under another law. It was contended in that case, as above quoted, that the provision of the act were in the nature of "prison discipline," and the court said:

"A statute which mitigates the penalty is not objectionable, though passed after the offense. Nor, speaking generally, are statutes which relate to procedure or penal administration or prison discipline, even though the effect may be, in the last two instances, to enhance the severity of the confinement." (157.)

(This is the contention of the Supreme Court of Illinois.)

The court must necessarily, therefore, have held that the law in question was not one providing in its nature for prison discipline, or penal administration, or criminal procedure, otherwise it would not have been *ex post facto*, and the judgment would have stood.

In commenting upon the latter case and the Massachusetts statute and cases in general, Circuit Judge Putnam, in the District of Massachusetts *in re Murphy*,* 87 Fed., 549, 552, says:

"At the outset, the act of 1895 declares that the court 'shall not fix the term of imprisonment.' If this were to be taken literally, it would clearly be unconstitutional if retroactive, because it would deprive a person charged **of a right to the judicial determination of his sentence,** given by the law existing when the offense was committed, as we have already shown. But the Supreme Judicial Court of Massachusetts has said that it is not to be thus taken, notwithstanding the fact that, by the effect of the act, **the term of actual imprisonment is practically fixed by the executive officers of the state.** * * * Under the act of 1895 he cannot entitle himself, as a matter of right, to a permit, but the whole is a matter of option on the part of the executve boards, to be exercised without any explanation or any reason given pro or con. Moreover, under that act, other important conditions were added which would permit the recall of a permit, and still others which would revoke it absolutely."

The court in deciding that case, referring to the opinion of the Supreme Court of Massachusetts, in *Murphy* v. *Commonwealth* (*supra*) says:

"The court apparently regards it all as a matter of prison discipline, which affects no substantial rights. * * * We have, however, grave doubts about the constitutionality of the statute of 1895 * * * and we have explained our doubts in order to show that we ought to give the petitioner an opportunity to apply to give bail, if he desires, pending an appeal to the Supreme Court."

The petitioner did not adopt the method suggested by Judge Putnam, but sued out a writ of error to this court , which was decided in *Murphy* v. *Mass.*, 177 U. S., 155, upon the question of twice in jeopardy.

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*A habeas corpus proceeding instituted by the defendant in the case last above cited.

Miller v. *Sate*, 149 Ind., 607; s. c., 40 L. R. A., 109.

This decision adopts the reasoning and conclusion of the Supreme Court of Illnois in *George* v. *People* (*supra*). The judgment was affirmed and the law in question upheld by three judges. Two judges dissented and held the law inquestion unconstitutional. The main reason of upholding the law is based upon the argument that

"such a sentence is in effect a sentence for the maximum fixed by the court, unless a permit to be at liberty is issued as provided by section 2."

As heretofore pointed out, it was not the intention of the legislature to make every sentence a sentence for the maximum term, otherwise why put in the provision.

"the term of such imprisonment shall not be less than one year. * * * "

The court also there held:

"That the judgment of guilty and sentence is complete and effective, so as to warrant and require the convict to remain in prison to the end of the maximum term fixed in the judgment of conviction, unless ministerial or administrative officers, the board of managers, acting under the authority of the act, shall shorten the term of service in case a reformation of the convict is effected. The power to do this is not judical power, but is a purely ministerial or administrative power. It is not more the exercise of judicial power **than the power of the governor to grant reprieves, commutations and pardons, after conviction."**

This reasoning is, we submit, fallacious.

In *exparte Wells* (*supra*), 18 How., 307, 309, this court said:

"It is also said that a President granting such pardon assumes a power not conferred by the constitution—that he legislates a new punishment into existence, and sentences the convict to suffer it; in this way **violating the legislative and** judicial powers of the government, it being the province of the first, to enact laws for the punishment of offenses against the United States, and that of the judiciary to sentence convict

for violations of those laws, according to them. It is said to be the existence of prerogative, such as the king of England has in such cases; and that, under our system, there can be no other foundation, empowering a President of the United States to show the same clemency.

* * * * *

In the first it is forgiveness, release, remission. Forgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise. * * * Without such a power of clemency to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of deity, whose judgments are always tempered with mercy."

We respectfully submit that the dissenting opinions of Justices Jordan and Howard, in the Indiana case, are in accord with principle and justice and completely refute the majority opinion.

State ex rel. v. *Peters*, 43 Ohio St., 629.

This case is principally relied upon by defendants in error. When fully considered, the opinion is of little value. That case was a *quo warranto*, instituted by the attorney general against the men constituting the board of directors of the Ohio penitentiary. In conclusion the court said:

"Whether under this act and the legislation adopted by the board a case might not possibly arise in which the personal rights of the prisoner would be infringed, it is impossible to say. **Until such case does arise, we need not consider the question. So far as the state has a right to inquire we hold this legislation valid."**

The law in question was attacked on two grounds. First, because it deprived the governor of his pardoning power; and, second, because the act provides for the exercise of judicial power. Point one need not be here considered, because we do not contend that the act in question in express language, deprives the governor of his pardoning power. With reference to point two, the court holds that it is not a delegation of

judicial power for the reason that it does not purport to discharge the prisoner or shorten his term of service, that it simply authorizes the board of managers to permit prisoners to go outside the building and enclosures of the penitentiary. Such prisoners, however, to remain in their legal custody and under their control.

It is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit.

"The only party who could object is the prisoner and he cannot when it is clearly for his benefit."

The opinion, therefore, is of little weight in considering the question in the case at bar.

The illogical contention upon which we are now commenting is so squarely destroyed in one of the dissenting opinions, that of Chief Justice Howard in *Miller* v. *State*, 149 Ind., 607 (s. c., 40 L. R. Reports, 109), cited by defendant in error, that we quote from it.

"The clear meaning of the act, if, indeed, it does provide for an indeterminate sentence, is, rather, that the sentence should be for some time more than two years, and less than fourteen years, such time to be finally determined by the board of managers of the reformatory. That, however, would be to substitute for the judgment of the court trying the case the judgment of the administrative officers appointed to carry out the sentence. Such an interpretation of the act makes it a plain invasion of the constitutional functions of the judiciary. If on the other hand, it should be conceded that the sentence is, in effect, a sentence of imprisonment for the maximum period of fourteen years, then we have the anamoly that there is no gradation in the crime of burglary; that the ragged boy who lifts a latch and steals a loaf of bread for his suffering mother, brothers and sisters is to receive his fourteen years, quite the same as the crime-hardened reprobate who breaks into a banking house and carries off the life earnings of the aged and helpless depositors."

A court in passing sentence tempers its judgment by the necessity of the case. Under the statute here attacked the Board of Pardons has no authority to ameliorate the term of imprisonment or to issue a conditional pardon for any reason existing *prior* to the sentence. The illustration so tersely put by Chief Justice Howard could not appeal to the Board of Pardons and could not be taken into consideration by it. The board is governed in its action only and exclusively by the conduct of the prisoner *after* his committment.

To quote from another dissenting opinion, that of Judge Jordan, in the same case:

"The right to determine and decide as to the extent to which a convicted person shall be punished by imprisonment under and within the limits of an existing law cannot be wrested from the court and jury and lodged elsewhere. The provisions of the statute under consideration wholly rob the court of all judicial discretion in regard to the term of imprisonment, and in imperative language require it to sentence the prisoner to the custody of the board of managers of the reformatory for an indefinite term.

* * * * * *

The feature of the statute which leads me to condemn it as antagonistic to the constitution is that which unquestionably divests the judiciary of its rights and powers to a certain extent; and to this extent, and in this respect, the law, in my judgment is invalid and cannot be sustained; and this must be true without regard to the question of whether it invests some ministerial board or person with judicial functions. * * * It (the court) is not permitted to decide what, in its judgment, under the circumstances in the particular case, ought to be the term of imprisonment within the limits provided by law. The man who is convicted of the theft of a pie or a plug of tobacco of the value of 10 cents must be turned over to the prison officials to be restrained of his liberty for the same period as one who has committed the heinous offense of stealing his neighbor's hogs or sheep, of the value of $24. The court can exercise no discretion and decide in accordance with the dictates of his own judgment. This is so evident that a mere reading of the statute is sufficient to condemn it in this respect."

The fixing of the term of sentence by the State Board of Pardons is a judicial act. Upon the exercise of this judicial function the defendant is not entitled to be present or to be heard, nor is the act itself subject to review. This legislative enactment thus undertaking to pass an act

"operative upon liberty, life or propery, or judicial in its essence, is contrary to the due process demand of the constitution and void. The act simply usurps judicial authority."

Brannon on 14th Amendment, 297, and cases cited.

I.

With reference to Point I, the attorneys for defendant in error insist that the record recital that "*the jury were in charge of sworn officers*" is a sufficient answer to our contention that the officers were not sworn in the manner or at the time prescribed by statute and the common law. The same argument was urged in the Supreme Court of the state. In reply thereto that court says;

"Clearly, it is not a necessary part of the record, and we are inclined to the view that it should not be considered even a proper part, within the rule which precludes evidence tending to contradict a record." (372)

And the question considered by that court with reference to this point was:

"Whether the requirement of the statute is one which can be waived by the defendant by his consent, and if so, does the mere fact that he failed to object at the time, amount to such consent or waiver?" (372.)

And the Court upon this proposition says:

"The law making it the duty of the court to place the jury in charge of sworn officers is no more positive or imperative than the duty of seeing that the jury is kept together and not permitted to communicate with others, and we see no good

reason for holding that the one requirement may not be waived by a failure to object, as well as the other." (374.)

As an additional reply to this point, attorneys for the defendants in error contend that;

"The courts of Illinois have never reversed on such ground, (point I) except where it positively appeared of record that the officers were not sworn."

McIntyre v. *People*, 38 Ill., 514.
Lewis v. *People*, 44 Ill., 462.
Gibbons v. *People*, 23 Ill., 518.
Jackson v. *People*, 36 Ill. App., 88.

In *McIntyre* v. *People*, *supra*, the question was raised in no other way than in the case at bar.

In *Lewis* v. *People*, *supra*, the question was raised by an affidavit in support of a motion for a new trial, as in the case at bar.

In *Gibbons* v. *People*, *supra*, the question was raised for the first time on a motion for a new trial, and so far as appears from the record of the case, in the same manner as in the case at bar.

In *Jackson* v. *The People*, *supra*, it does not appear that the question was raised in any other manner than in the case at bar. The court in its opinion says:

"It was no part of the duty of the defendant to see that the officer was sworn, or to object to his taking charge of the jury until he was sworn. It was the duty of the People to see that this was done, or that it was waived by an agreement entered on the minutes of the court."

A large number of authorities are cited on page 9 of defendant in error's brief to the effect that:

"The principle that an accused may waive a right extends to the highest rights, even to those secured by the constitution."

It is unnecessary to review the great number of authorities cited. Both the Supreme Court of Illinois and this court are committed upon this proposition.

In *Dempsey* v. *The People*, 47 Ill., 323, the defendant was placed on trial for a felony. During the progress of the trial the jury heard the statement of a witness, who was not sworn.

In passing upon the question that court says:

"It may be urged that the error was waived, **inasmuch as the statement was not objected to by the accused** * * * It is an ancient maxim of the law that in capital cases the accused stands upon all his rights, and waives nothing. He then could not be prejudiced by failing to object to the introduction of this evidence. And the same may be said as an answer to the fact that he did not move to have it excluded from the jury. **It is the province of the judge trying the accused, to see that he has a fair and impartial trial, and if within his power, he should have prevented the statement from being made, and if that could not be done, then he should have, on his own motion, excluded it from the jury."**

For the reasons above stated the case was reversed.

In *Guykowski* v. *The People*, 1 Scammon (Ill.), 476, the court adhered to the same doctrine.

In *Perteet* v. *People*, 70 Ill., 171, the court held that the defendant might waive certain rights, but his express consent thereto must affirmatively appear of record.

In *Paulson* v. *The People*, opinion handed down February 21, 1902, by the Supreme Court of Illinois, that court held where a defendant had expressly waived of record, a trial by jury in a *misdemeanor case* that a trial by the court without a jury under such waiver, was of no effect, for the reason that the defendant could not, even by express consent, waive his constitutional right of trial by jury, the court saying:

"As jury trials in criminal cases, as known at common law, were such as followed upon indictment in a common law court, and as our constitution refers to the right of trial by jury as it

was understood at common law, then the prohibition against the right to waive a trial by jury cannot apply to misdemeanors, because the constitution provides that in cases of misdemeanors, a person may be held to answer without indictment." (56–57.)

"The misdemeanors to which we then (*Brewster* v. *People*, 183 Ill., 143.) referred in which a trial by jury might be waived, were such only as could be prosecuted otherwise than by indictment, as is clearly indicated in the concluding clause of the quotation. Though offenses punishable either by fine, or by fine and imprisonment in the penitentiary, have been classed as misdemeanors when it was necessary to determine as to the application of the Statute of Limitations prescribing a period for beginning prosecutions for such offenses (as in the Lamkin case, *supra*), or to determine whether judgments of conviction in such cases should be removed for review from the trial court to the Appellate or direct to the Supreme Court (as in the Baits case, *supra*), or whether counts for such offenses and for offenses punishable only by imprisonment in the penitentiary may be joined in one indictment (as in the Herman case, *supra*), still such offenses must, in obedience to the command of said section 8 of article 2 of our constitution, be prosecuted only on indictments preferred and returned by a grand jury. As to cases of that character the question whether they may be tried by the court without the intervention of a jury does not depend upon their classification as misdemeanors. *The tribunal which may lawfully try that class of cases is one, as we have seen, which, according to the course of the common law, had jurisdiction to try the guilt or innocence of persons who stood charged, by indictment, with the violation of the criminal law.* A jury was an essential branch of that tribunal, and it is not within the power of one accused by indictment of an offense which can only be lawfully prosecuted by an indictment, even with the consent of the State's Attorney, to confer upon the judge of such tribunal the power to try and determine as to his guilt or innocence without the intervention of a jury."

Hopt v. *Utah*, 114 U. S., 488, was a writ of error from this court to the Supreme Court of the Territory of Utah. One of the errors assigned was that the record did not comply with the statute of Utah requiring that the written charges of the court should form part of the record.

By the code of procedure of Utah the charge of the court to the jury "must be reduced to writing before it is given, *unless by mutual consent* of the parties it is given orally."

It was argued to the court that it was obligatory upon the defendant to raise the objection, and that the presumption of law was that the charge was in writing, as provided by the state.

In passing upon the question there at issue this court, in reversing the case, says:

"When the record shows that the jury were charged by the court nothing can excuse the omission to set forth in the record a charge in writing, except **express consent of the defendant that it should be given orally, and that consent must appear of record.** The record must either set forth the charge in writing, or a waiver by the defendant of such a charge. If it does neither, it fails to show what is made by express statute an essential requisite to the validity of the conviction, and contains upon its face a fatal error, of which the defendant may avail itself by appeal, without tendering a bill of exceptions.

"The duty of making up a complete record is the duty of the clerk; and the duty of seeing that the record contains everything that actually took place, necessary to support the conviction, is the duty of the district attorney. If the copy of record made up by the clerk of the District Court, and entered by the defendant in the Supreme Court of the Territory, was defective in a material point, the district attorney might have moved in the latter court to have the defect supplied by *certiorari* or other proper process. **The defendant and his counsel were under no obligation to cure, and cannot be held to have waived any defect in the record, but were entitled to take advantage, either in the Supreme Court of the Territory, or in this court, of any error apparent upon the record as it stood in that court.**

"Applying these principles to the record before us, the conviction cannot be supported. The record merely states that the court charged the jury, and does not state whether the charge was written or oral. If the charge was written, it

should have been made part of the record, which has not been done. If it was oral, the consent of the defendant was necessary, and that consent does not appear of record, and cannot be presumed."

In *Crain* v. *United States*, 162 U. S., 625, 644, the question arose as to whether or not a judgment of conviction might stand where the record did not show that the defendant had been arraigned.

In passing upon that question, this court says:

"Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime, **nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases, involving the life or liberty of an accused, are often prepared**. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, **it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken.** That cannot be predicated of the record now before us. **We may have a belief that the accused, in the present case, did, in fact, plead not guilty of the charges against him in the indictment. But this belief is not founded upon any clear, distinct, affirmative statement of record, but upon inference merely.** That will not suffice. We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law; consequently such a defect in the record of a criminal trial is not cured by section 1025 of the Revised Statutes, but involves the substantial rights of the accused.

It is true that the constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty with-

out due process of law; **and due process of law requires that the accused plead, or be ordered to plead,** or in a proper case that a plea of not guilty be filed for him before his trial can rightfully proceed; **and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise, the judgment will be erroneous.** The suggestion that the trial court would not have stated, in its order, that the jury was sworn to try and tried "the issue joined," unless the defendant pleaded, or was ordered to plead, to the indictment, cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty, and may deserve full punishment imposed upon him by the sentence of the trial court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

It will be noticed from the dissenting opinion filed by Mr. Justice Peckham, that the same argument was there advanced as is advanced in the case at bar by the attorneys for defendant in error, as follows:

"A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review." (649)

II.

"The discharge of the jury on the first trial under the circumstances in the case at bar."

In reply thereto, attorneys for defendants in error cite numerous authorities with the conclusion that "the contrary doctrine prevails" in Pennsylvania, Tennessee, Virginia, and probably one or two other states.

In reply to the statement above quoted, we collate the authorities upon the proposition:

That there has been prior Jeopardy.

TENNESSEE.

Mahala v. *The State*, 10 Yerg., 235.

ALABAMA.

McCauley v. *The State*, 26 Ala., 135.
Nedd v. *The State*, 7 Porter, 187.
Cobia v. *The State*, 16 Ala., 781.
Ex parte Vincent, 43 Ala., 402.

VIRGINIA.

Commonwealth v. *Williams*, 2 Gratt., 570.

NORTH CAROLINA.

State v. *Ephriam*, 19 N. C., 162.
State v. *Altman*, 64 N. C., 364.

ILLINOIS.

Logg v. *People*, 8 Ill. App., 99.

MISSISSIPPI.

Whitten v. *The State*, 61 Miss., 717.

WEST VIRGINIA.

Crookham v. *The State*, 5 W. Va., 510.

NEBRASKA.

Conklin v. *The State*, 41 N. W., Rep., 788.
State v. *Schuckart*, 18 Neb., 754.

PENNSYLVANIA.

Commonwealth v. *Fitzpatrick*, 121 Pa. St., 109.
Highlands v. *Commonwealth*, 111 Pa. St., 1.
Commonwealth v. *Cook*, 6 S. & R., 577.
Commonwealth v. *Clue*, 3 Rawl., 497.

KENTUCKY.

O'Brien v. *Commonwealth*, 72 Ky., 333.
Robinson v. *Commonwealth*, 88 Ky., 386.

TEXAS.

Powell v. *The State*, 17 Tex. App., 345.
Wright v. *The State*, 15 S. W. Rep., 717.

OHIO.

Dobbins v. *The State*, 14 O. St., 493.
Poage v. *The State*, 3 O. St., 229.
Hurley v. *The State*, 6 Ohio, 399.

We cite authorities from twelve states which make for our contention. Attorneys for defendant in error admit the accuracy of this statement, for they do not challenge or comment upon a single authority cited in our opening brief.

In considering the various authorities cited by defendant in error with reference to the effect of the discharge of the jury, under the facts pointed out in our opening brief, this court will take into consideration the various provisions of our constitution and statutes with reference to jeopardy, criminal trials and trials by jury. And, while it may be that many of the authorities which are relied upon in defendant in error's brief do not cite the provisions of the constitutions of the respective states, or the statutes in force in those states, the decisions are necessarily based upon the provisions of the respective constitutions and statutes.

That There Has Not Been Prior Jeopardy.

ALABAMA.

Barrett v. *State*, 35 Ala., 406. That authority does not make against our contention.

See authorities cited on page 56 of our original brief, including:

Ned v. *State*, 7 Porter (Ala.), 187.
McCauley v. *State*, 26 Ala., 135.
Ex parte Vincent, 43 Ala., 402.

CALIFORNIA.

Ex parte McLaughlin, 41 Cal., 211.

Section 687 of the Code of Criminal Procedure of the State of California provides that "no person can be subject to a second prosecution for a public offense for which he has once been prosecuted, and convicted or acquitted." And the statutes of California likewise provide that a court may discharge a jury "if it satisfactorily appears that there is no reasonable probability that the jury can agree."

No such provision is in our statutes.

CONNECTICUT.

The case cited is *State* v. *Woodruff*, 2 Day, 504. Counsel has cited the entire opinion of the court. The Constitution of the State of Connecticut, (Sec. 9, p. 44 of the General Statutes and Constitution), makes no provision that a person shall not twice be placed in jeopardy for the same offense.

DELAWARE.

State v. *Updike*, 4 Harr., 581.

The entire report of this case (and no part thereof is the opinion of a court), is as follows:

"This case was tried on a previous day of this term; and the jury being unable to agree, after being up all night, were discharged by the court from rendering a verdict.

It now came up again before another jury, and the defendant was convicted.

Bayard, Jr., moved to arrest judgment, on the ground that the jury having been discharged in the former case without the prisoner's consent, he could not be tried again without putting him twice in jeopardy; but he afterwards withdrew his motion, being satisfied that the ground was not tenable."

GEORGIA.

Williford v. *State*, 23 Ga., 1.

Lester v. *State*, 33 Ga., 329.

In the former case the court, among other things, says:

"As to a mistrial being tantamount to an acquittal, that idea has long since been exploded; since the leading case between *Goodwin and the People of New York, in* 18*th Johnson's Reports*, this point has never been seriously pressed upon the courts.

The record does not disclose, whether the jury were permitted to take their breakfast on the morning of the day before they were discharged. They should have been allowed this indulgence. The idea of starving a jury into a verdict is against all philosophy. Hungry men are always quarrelsome. Brother Jonathan was feasted and flattered by the ambassador of John Bull into the Clayton-Bulwer treaty; while the roar of the British lion would have passed unheaded as the idle winds.

After the jury have been out all night, the courts should always, after suffering them to partake of refreshments, give them another opportunity to agree upon a verdict. If they then fail, the case may generally be considered as hopeless." (p. 3.)

In the opinion of the court in the latter case (*Lester* v. *State*) the court says:

"A candid inquirer cannot but admit that in a case of extreme or absolute necessity the jury may be discharged without the prisoner's being thereby acquitted." (p. 331.)

ILLINOIS.

Logg v. *The People*, 8 Ill. App., 106: This authority is sufficiently commented upon on page 43 of our opening brief. The authorities therein cited are the authorities holding squarely the doctrine contended for by plaintiff in error.

INDIANA.

Numerous authorities are cited by defendant in error from Indiana. However, the Supreme Court of Indiana has held, in *State* v. *Leunig*, 42 Ind., 541, that

"The mere ruling or finding of the court that the ends of justice require the discharge of the jury will not of itself be sufficient to establish a necessity for their discharge, especially when the facts in the record show that no such necessity existed. The judge might find that the ends of justice required the discharge of the jury and the continuance of the cause in order that absent witnesses might be procured or for any other cause, when in fact there was no necessity for it. We do not think it necessary in this case to reopen the discussion of the question as to when and under what circumstances the jury may be discharged without its being equivalent to a verdict of not guilty. We are satisfied that in the case at bar there was no necessity for discharging them, and that the court permitted no error in ordering the discharge of the prisoner."

Section 1828 of the Code of Criminal Procedure of the State of Indiana provides that the jury shall retire to consider their verdict in charge of an officer, who shall, when the jury have agreed upon their verdict, "return them into court (when so agreed) *or when ordered by the court.*"

The distinction between that statute and our own is apparent.

MARYLAND.

Hoffman v. *State*, 20 Md., 425, is cited with the comment: "This precise question was not involved." It is, therefore, unnecessary to review the authority.

MASSACHUSETTS.

Two authorities are cited from this state: *Commonwealth* v. *Purchase*, 19 Mass., 521, and *Commonwealth* v. *Bowden*, 9 Mass., 493. These authorities are decided under the provisions of the statutes of Massachusetts (Sec. 6, p. 1133, of the Public Statutes of Massachusetts), which provide that "no person shall be held to answer the second indictment for an offense of *which he has been acquitted by a jury upon the facts and merits.* * * *"

MICHIGAN.

Two authorities are cited from the State of Michigan, *People* v. *Schoeneth*, 44 Mich., 488, and *People* v. *Harding*, 53 Mich., 487. The twenty-ninth section of the Constitution of Michigan, to be found on page 54 of the General Statutes of Michigan (edition of 1882), provides that "no person after acquittal upon the merits shall be tried for the same offense." Thus it will be seen that under the Constitution of Michigan a man may be placed in jeopardy and tried again so long as there has not been "an acquittal upon the merits." This is not the constitution of Illinois.

MISSISSIPPI.

The cases there cited are referred to in our opening brief. (p. 56.)

NEW YORK.

The statute of the State of New York provides (Sec. 428 of the Criminal Code of the State of New York) that:

"After the jury have retired to consider of their verdict they can be discharged before they shall have agreed thereon only in the following cases:

1. Upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together; or

2. When, after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or

3. When with the leave of the court the public prosecutor and the counsel for the defendant consent to such discharge." (Page 170.)

Section 430 of the same code provides that:

"In all cases where a jury are discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term."

People v. *Goodwin*, 18 John, 187

(notwithstandingthe statute cited, *supra*), simply holds that:

"Upon full consideration I am of opinion that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of *extreme and absolute necessity.* * * * And in the present case, considering the great length of time the jury had been out, that the period for which the court could legally sit was nearly terminated and that it was morally certain the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal."

NORTH CAROLINA.

Defendant in error cites *State* v. *Jefferson*, 66 N. C., 312. This case does not make against our contention, but, on the

contrary, the Supreme Court of North Carolina, in *State* v. *Altman*, 64 N. C., 364, lays down the rule as we contend it to be. (See p. 55 of our brief.)

OHIO.

Dobbins v. *State*, 14 Ohio St. Rep. 494.

In that case the Supreme Court says (502):

"For wise reasons no investigation is frequently permitted of what transpires in the consultations of the jury; and when they unanimously return their inability to agree it is conclusive of the fact that they have not agreed and may rightfully have its just weight in determining the question whether they are likely to do so. But as this must be mere matter of opinion in which they are often found mistaken it ought never to be permitted to take the place that the actual fact that they have deliberated so long has under all the circumstances attending it to convince the court that no agreement can be expected. When the court is so convinced and the facts are such as to justify the conviction the order discharging may be made. But as this order may most materially affect the legal rights of the party, and as a discharge without sufficient reason is in effect an acquittal, it must appear from the record, to justify holding him to a further trial, that the obstacle which the law will recognize as a necessity did in fact exist, that it engaged the attention of the judge, that his order was based thereon and was the result of consideration and decision. * * * But it is claimed by counsel for the state that this whole matter is one of pure discretion in the court where the trial is had. * * * We are of different opinion. It is one of the very clearest of the legal rights of the accused to require a verdict if one can be had, and we know of no case in which any one can be deprived of his legal rights at the mere irresponsible discretion of a court."

The Supreme Court of Ohio then reviews the decisions of New York, which are also seemingly against our contention, and with reference to those authorities say:

"But the decision of that court (N. Y.) is undoubtedly placed upon the ground that it was a matter of discretion in the court

below, and if the power had not been discreetly exercised there could be no remedy. This may be true in New York, but it is not true in Ohio."

This decision must be read in connection with section 7313 of the Ohio Code, which provides that:

"The court may discharge a jury without prejudice to the prosecution for the sickness of a juror, the corruption of a juror, or other accident or calamity, *or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal.*"

Notwithstanding this section of the statute the Supreme Court of Ohio has held that:

"In such case the record must show the existence of the necessity which required the discharge of the jury. Otherwise the defendant will be exonerated from liability of further answering to the indictment."

Dobbins v. *State*, 14 O. St., 493.

Poage v. *State*, 3 O. St., 229.

Hurley v. *State*, 6 Ohio, 399.

It will thus be seen that this authority makes for our contention and by no means makes against it.

RHODE ISLAND.

State v. *Nelson*, 33 L. R. A., 560.

This case was decided under the Rhode Island Constitution, article 187, which provides, unlike our constitution, that no person shall, "after acquittal," be tried for the same offense.

SOUTH CAROLINA.

State v. *McKee*, 1 Bailey, 161.

While this case may make against our contention, the court there holds the following:

"Taking, then, our own decisions, and those of the United States courts, of New York, and of England, together, we are enabled to say, that a jury, after they are charged, can be discharged, and the prisoner tried a second time, for the following causes only: 1st. The consent of the prisoner. 2d. Illness of one of the jury, the prisoner or the court. 3d. Absence of one of the jurymen. Or 4th. *The impossibility of their agreeing on a verdict.* Beyond these, I apprehend the court has no right to go. It is said that it is a matter of discretion with the court, to discharge the jury, whenever they may think it consistent with the ends of justice. It is true, it is a matter of discretion, but in the language of Junius, it is a 'legal discretion,' and must be exercised in conformity to known rules. Arbitrary discretion is but another name for caprice or favor. Under its exercise, the boldest may tremble, and the free be made slaves. It is better, therefore, to act upon a fixed rule, even if it should now and then enable the guilty to escape, than to act without a rule, to the terror and danger of the innocent."

TEXAS.

Moseley v. *State*, 33 Tex., 671.

The statute of the State of Texas provides that:

"If a jury fail to agree upon a verdict after being kept together a reasonable time they shall be discharged, and if there be time left on the same day another jury shall be empaneled to try the case, or the justice may adjourn not more than two days and again empanel a jury for the trial of such cause."

In several of the states above referred to the constitutions and statutes make provisions for the discharge of juries. There is no such provision in the Constitution of the State of Illinois, or in its criminal statutes. On the contrary, there is every provision preserved which can possibly tend to indicate that trial by jury shall be as at the common law, and that the common law therein referred to is the common law prior to the fourth year of James I. (Hurd's Rev. St. Ill., p. 418.)

In deciding the question of twice in jeopardy, this court

should not, we respectfully urge, decide it upon a question of convenience or judicial discretion, but upon the basis of a clear legal right vested in the defendant. If, under the circumstances in the case at bar, the trial court had a right to discharge the jury as they were about to agree on a verdict of acquittal upon the claim of "judicial discretion" then, who can deny that this same court would have kept this same jury considering the case, if, instead of standing nine for acquittal and three for conviction, they had stood nine for conviction and three for acquittal.

The life and liberty of a man, be he ever so guilty, should not be left to rest upon the vacillation of a judge, which is the other name for discretion.

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Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
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Brf. of Hamlin & Deneen for D.

No. ~~506~~. 37

Filed April 14, 1902.

IN THE Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

EDWARD S. DREYER,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

BRIEF AND ARGUMENT IN BEHALF OF DEFENDANTS IN ERROR.

H. J. HAMLIN,
Attorney General,
CHARLES S. DENEEN,
State's Attorney of Cook Co.
ATTORNEYS FOR DEFENDANTS IN ERROR.

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IN THE

Supreme Court of the United States.

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EDWARD S. DREYER,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

On February 4, 1899, an indictment was returned to the Criminal Court of Cook County, State of Illinois, against the plaintiff in error, for failure to turn over on demand to his successor in office funds which came into his hands as treasurer of the West Chicago Park Commissioners, amounting to $316,000. The indictment was based upon section 215 of the Criminal Code of the State of Illinois, quoted on pages 1 and 2 of plaintiff in error's brief. At a trial had under such indictment in August and September, 1899, the jury disagreed, whereupon the Court entered the following order:

"* * * The jury aforesaid having now returned into Court *and being unable to agree* upon a verdict are thereupon discharged from the further consideration of this case." (Rec., 14.)

At a second trial, had in February and March, 1900, the defendant was found guilty, and, after the overruling of motions for new trial and in arrest of judgment, was sentenced in conformity with the law of the State of Illinois, approved April 21, 1899, and in force July 1, 1899, entitled "An Act to revise the law in relation to the sentence and committment of persons convicted of crime, and providing for a system of parole, * * *" the first six sections of which are set forth in plaintiff in error's brief on pages 78 to 83.

As stated in the opinion of the Court below:

"It was not denied on the trial that $316,013.40 of the Park Commissioners' funds came into the hands of the defendant, as its treasurer, which he failed to pay over to his successor on demand, and the only defense attempted to be interposed was, that his failure to pay it over was the result of unavoidable loss or accident."

As the assignments of error are not predicated upon any facts involving the merits of the offense charged in the indictment, or whether such failure was the result of unavoidable loss or accident, it is necessary to recite only such facts from the record as pertain to such assignments of error.

The matters relied upon as errors are, (1) that at the second trial the bailiffs in charge of the jury were not sworn in accordance with the statutes of the State of Illinois; (2) that the discharge of the jury in the first trial was arbitrarily made without the consent of the defendant and that therefore the trial operated to place him once in jeopardy, and (3) that the "indeterminate sen-

tence law" of the State of Illinois under which judgment was entered and sentence imposed upon the plaintiff in error, is unconstitutional.

As to the first point, the following are the only facts of record:

That on February 20th, 1900, eight jurors were selected and sworn and the following order entered:

"And it is further ordered by the Court that during each adjournment of this Court during the trial of this cause the jurors remain in charge of *sworn* officers of this Court to be by them kept together and returned into Court at the hour ordered pursuant to adjournment." (Rec., 15 and 16.)

That on February 21st, 1900, the other four jurors were selected and sworn and the taking of testimony begun (Rec., 16); that the hearing continued until February 28th, when it was entered of record that,

"The aforesaid jury, hearing the further arguments of counsel and the instructions of the Court, retired in charge of *sworn* officers to consider of their verdict." (Rec., 19.)

That on March 1st, the following order was entered:

"And also come the jurors of the jury aforesaid in charge of *sworn* officers of this court; and the aforesaid jury, for verdict say, 'We, the jury, find the defendant, Edward S. Dreyer, guilty, etc." (Rec., 19.)

In addition to the foregoing matters of record, it appeared by the bill of exceptions that upon motion for a new trial certain affidavits were presented to the effect that the bailiffs were not sworn after February 20th, nor in the language of the statute. Counter affidavits also were filed. One of the affidavits filed in support of the said motion was by one of the trial attorneys for plaintiff in error, which stated, in effect, that having in mind the

requirements of the statute, he was specially watching to note whether it was complied with (Rec., 32). But no objection was made to the retirement of the jury with the officers as sworn, no ruling was called for upon that matter by the vigilant attorneys, and the omission to swear the bailiffs in due form and time, if it occurred, does not appear as a matter of fact in the record, not even by any recital of the court in the bill of exceptions. In a separate opinion of affirmance, Mr. Justice Cartwright and Chief Justice Boggs held that the record did not present the question raised in this assignment of error. (*Dreyer* v. *People*, 188 Ill., 60-64.)

As to the question of "once in jeopardy," the following are the only facts in the record relating thereto:

That at the close of the previous trial of the plaintiff in error under the same indictment, had from August 29th to September 2d, the following order of discharge was entered:

"And also come the jurors of the jury aforesaid, being now returned into court *and being unable to agree* upon a verdict, are thereupon by order of this court discharged from further consideration of this cause." (Rec., 14.)

And the fact that the jury were out about seventeen hours, also appears.

An effort was made by counsel in the trial court to amend this record by striking out the words "*being unable to agree,*" but the Court denied the motion. (Rec., 18.)

A plea of once in jeopardy was filed, alleging that the jury retired to consider their verdict at 4:55 p. m., September 1st, 1899, and were discharged the next morning at 9:30 a. m. It further alleges pretended knowledge of the number of ballots taken and the standing of the jury

upon each, and sets forth the claim that plaintiff in error through his attorney objected to the discharge of said jury. But none of these matters were admitted in evidence, except the fact as to the time the jury retired and were discharged, and it was nowhere preserved in a bill of exceptions what transpired at the time of the discharge of the jury, or whether any protest or objection thereto was made by plaintiff in error, or any exception taken by him to the order of the court discharging the jury.

So far, therefore, as the record shows, the only basis of fact upon which the claim of once in jeopardy can rest is the order of the court finding that the jury was unable to agree and the fact that the jury were out about seventeen hours.

There is nothing in the record to sustain the contention that the jury were discharged without the consent of plaintiff in error. There was a mere offer to prove it. (Rec., 261, 279.) The court below in the main opinion did not consider whether this question was properly raised, but said:

"Conceding that the question was regularly raised on the trial, it was properly overruled. The plea was based upon the theory that by the discharge of the jury upon the first trial without the consent of the defendant, he was entitled to be then acquitted and could not be legally put upon trial a second time. As shown above, the jury were discharged for the reason *that it was unable to agree.*"

These, together with the judgment and sentence of the court, being the only essential matters of record which will receive the consideration of this court upon the assignments of error, we pass to a discussion of the questions of law raised by them.

BRIEF.

I.

As to the Record and Party's Own Acts.

1. *Where the officer who takes charge of the jury on retiring to consider their verdict is not sworn, objection and exception should be taken and preserved by bill of exceptions.*

U. S. v. *Ball*, 163 U. S., 662, 674.
McKinney v. *People*, 2 Gilm., 540, 554.
Pate v. *People*, 2 Gilm., 644, 662.
Holmes v. *People*, 5 Gilm., 478.
McIntyre v. *People*, 38 Ill., 514, 518.
Knouff v. *People*, 6 Ill. App., 154.
Atterberry v. *State*, 56 Ark., 515.
State v. *Frier*, 118 Mo., 648, 651.

The courts of Illinois have never reversed on such ground except where it positively appeared of record that the officers were not sworn.

McIntyre v. *People*, *supra*.
Lewis v. *People*, 44 Ill., 462.
Gibbons v. *People*, 23 Ill., 466.
Jackson v. *People*, 36 Ill. App., 88.

In all other cases the judgment has been affirmed.

McKinney v. *People*, *supra*.
Pate v. *People*, *supra*.
Holmes v. *People*, *supra*.
Knouff v. *People*, *supra*.
Sanders v. *People*, *supra*.
Morton v. *People*, 47 Ill., 476.
Dreyer v. *People*, 188 Ill., 40.

2. *The law presumes till the contrary appears that the court performed its duty, and where the record is silent it will be presumed that the jury retired in charge of sworn officers.*

McKinney v. *People, supra.*
Pate v. *People, supra.*
Holmes v. *People, supra.*
Knouff v. *People, supra.*
Morton v. *People, supra.*
Sanders v. *People, supra.*
State v. *Pitts*, 11 Iowa, 343.
State v. *Ryan*, 13 Minn., 370.
Clark v. *State*, 55 Tenn. (8 Bax.), 591.
People v. *Waters*, 1 Idaho, 560.
Bennett v. *Comm.* 8 Leigh, 745.

A recital in record that the officers placed in charge of jury were sworn sufficiently shows that they were duly sworn.

Holmes v. *People*, 5 Gilm., 478.
State v. *Nelson*, 132 Mo., 184.
Moore v. *State*, 96 Tenn., 209.
Lancaster v. *State*, 91 Tenn., 267.

3. *Courts are not disposed to reverse upon a mere claim of such irregularity, especially in absence of any showing of injurious results therefrom.*

Sanders v. *People*, 124 Ill., 218.
Wilhelm v. *People*, 72 Ill., 468.
Adams v. *People*, 47 Ill., 381.
Hittner v. *State*, 19 Ind., 48.
State v. *Crofton*, 89 Iowa, 109, 120.
State v. *Hayes*, 78 Mo., 307, 314.

State v. *Hays*, 78 Mo., 600, 608.
State v. *Frier*, 118 Mo., 648, 651.
People v. *Johnson*, 46 Hun., 667, 673.
State v. *Poindexter*, 23 W. Va., 805, 813.
Jarnagin v. *State*, 18 Tenn. (10 Yerg.), 529.
Stone v. *State*, 23 Tenn. (4 Humph.), 27.
United States v. *Ball*, 163 U. S., 662.

4. *The record imports verity, and its conclusiveness cannot be impeached by affidavits.*

Dreyer v. *People*, 188 Ill., 60-64.
Eastman v. *People*, 93 Ill., 112.
Henning v. *State*, 106 Ind., 386, 390.
Polin v. *State*, 14 Neb., 540, 549.
State v. *Frier*, 118 Mo., 650.
Van Houston v. *People*, 22 Colo., 53, 57.

The record could have been changed only by amendment, and if the court during the term had been satisfied of its incorrectness from the affidavits it could, even on its own suggestion, have amended it.

Weed v. *Weed*, 25 Conn., 337.
Kelty v. *High*, 29 W. Va., 381.

5. *The accused has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error, on account of such irregularities. If he neglects in proper time to insist on his rights, he waives them.*

McKinney v. *People*, *supra*.
Chase v. *People*, 40 Ill., 352.
Dyer v. *People*, 84 Ill., 624.
Eastman v. *People*, 93 Ill., 113.

Kelly v. *People*, 132 Ill., 371.
Atterberry v. *State*, 56 Ark., 515.
Henning v. *State*, 106 Ind., 386, 392.
Waterman v. *State*, 116 Ind., 51.
Polin v. *State*, 14 Neb., 540, 549.
Hunter v. *State*, 43 Ga., 483.
Thompson & Merriman, Juries, Sec. 399, note.

The principle that an accused may waive a right extends to the highest rights, even to those secured by the constitution.

(a) *Waiver of right to be confronted by witnesses.*
Reynolds v. *U. S.*, 98 U. S., 145.
Williams v. *State*, 61 Wis., 281.
Rosenbaum v. *State*, 33 Ala., 354.
U. S. v. *Sacramento*, 2 Mont., 239.
Shular v. *State*, 105 Ind., 298.

(b) *Of right to be present at trial.*
Sahlinger v. *People*, 132 Ill., 241.
State v. *Kelly*, 97 N. C., 404.
Fight v. *State*, 7 Ohio, 327.
State v. *Wamire*, 6 Ind., 357.
Barton v. *State*, 67 Ga., 653.
Price v. *State*, 36 Miss., 533.

(c) *Of separation of jurors in capital cases.*
Henning v. *State*, *supra*.
Polin v. *State*, *supra*.
U. S. v. *Gilbert*, 2 Sumner, 17.

(d) *Of copy of indictment and lists required by statute.*
Kelly v. *People*, 132 Ill., 371.

II.

The Question of Jeopardy.

The prevailing rule is that the discharge of a jury without the consent of the defendant, because, after mature deliberation, they are unable to agree upon a verdict, is not an acquittal, and does not entitle the defendant to immunity from further prosecution. Whether they can agree is a question for the sound discretion of the court.

U. S. v. *Perez*, 9 Wheaton, 579.
Barrett v. *State*, 35 Ala., 406.
Ex Parte v. *McLaughlin*, 41 Cal., 212.
State v. *Woodruff*, 2 Day (Conn.), 504.
State v. *Updike*, 4 Harr. (Del.), 581.
Lester v. *State*, 33 Ga., 329.
Williford v. *State*, 23 Ga., 1.
Logg v. *People*, 8 Ill. App., 106.
Dreyer v. *People*, 188 Ill., 47-49.
State v. *Nelson*, 26 Ind., 366.
State v. *Walker*, 26 Ind., 346.
Shaffer v. *State*, 27 Ind., 131.
State v. *Wilson*, 50 Ind., 487.
Hoffman v. *State*, 20 Md., 425.
Comm. v. *Purchase*, 2 Pick. (19 Mass.), 521.
Comm. v. *Bowden*, 9 Pick. (Mass.), 494.
People v. *Schoeneth*, 44 Mich., 498.
People v. *Harding*, 53 Mich., 487.
Price v. *State*, 36 Miss., 533.
Whitten v. *State*, 61 Miss., 723.
People v. *Greene*, 13 Wend. (N. Y.), 57.
Goodwin v. *People*, 18 Johns. Cases (N. Y.), 200.

State v. *Jefferson*, 66 N. C., 309.
Dobbins v. *State*, 14 Ohio St., 493.
State v. *Nelson* (R. I.), 35 L. R. A., 560.
State v. *McKee*, 1 Bailey (S. C.), 651.
Smith v. *State*, 22 Tex. App., 197.
Moseley v. *State*, 33 Tex., 671.
Proffatt on Jury Trials, Secs. 484, 485.
1 Bish. Crim. Law (6th Ed.), Sec. 1033.
Archbold Crim. Pr. & Pl., Vol. I, p. 593.
Graham & Waterman on New Trials, Vol II, p. 118.
Am. & Eng. Ency. Law (Jeopardy), Vol. XI, p. 953.

III.

Constitutionality of Indeterminate Sentence Law.

The indeterminate sentence acts, in providing for an indefinite period of imprisonment between the minimum and maximum term prescribed by statute, subject to powers of parole and discharge by the pardoning power, do not confer judicial power upon the pardon boards or boards of control, and infringe no constitutional rights of the prisoner.

George v. *People*, 167 Ill., 447.
People ex rel Bradley, v. *Ill. State Reformatory*, 148 Ill., 413.
Conlon's Case, 148 Mass., 168.
Com. v. *Brown*, 167 Mass., 144, 146.
Oliver v. *Oliver*, 168 Mass., 592.
Com. v. *Crowley*, 128 Mass., 121.
Murphy v. *Com.* (Mass), 43 L. R. A., 154.
Miller v. *State* (Ind.), 40 L. R. A., 109.
State v. *Peters*, 43 Ohio St., 629.

ARGUMENT.

For convenience we shall take up the alleged errors in which they are presented in plaintiff in error's brief.

I.

THE CONTENTION THAT THE JURY WERE NOT IN CHARGE OF SWORN OFFICERS, AS REQUIRED BY STATUTE, IS, ON THE RECORD AND STATE OF FACTS IN THIS CASE, UNTENABLE.

This contention, being predicated upon affidavits filed in support of a motion for a new trial (the statements in which are denied in counter affidavits), and in face of a **record which states that the jury were in charge of sworn officers, and which discloses no exceptions taken,** either to the oath administered or to the jury retiring in charge of such officers, raises the following questions:

(1) Can plaintiff in error be heard to complain of an alleged error to which he made no objection and with respect to which he has preserved no exception, and from which no injury is claimed?

(2) Will not the presumption arise from a recital in the record that the jury were in charge of *sworn* officers, that they were *properly* sworn and that the court did its duty?

(3) Can the record which discloses that the jury were in charge of sworn officers be impeached by affidavits to the contrary after verdict rendered?

(4) Can the accused stand by in silence while irregu-

lar proceedings take place, and then ask for a writ of error to reverse them? Does he not waive such irregularities?

1.

Where the officer who takes charge of the jury on their retiring to consider their verdict is not sworn, objection and exception should be taken, and preserved by the bill of exceptions.

The record discloses that the jury "**retired in charge of officers to consider their verdict.**" (Rec., 19.) And again: "**Now comes the jury in charge of sworn officers of this court, and for their verdict say,**" etc. (Rec., 19.) The record does not disclose any objection by defendant below to the jury retiring in charge of such officers, nor to the oath which was administered to such officers. No ruling of the court was invoked thereon, and no exception to such proceedings was preserved. The only way that the fact thus evinced by the record is questioned, is by affidavits presented in support of a motion for a new trial.

We do not question the ruling laid down in the cases of *McIntyre* v. *People*, 38 Ill., 520, and *Lewis* v. *People*, 44 Ill., 462, to the effect that the requirement of section 435 (Hurd's R. S. Ill.) of the Criminal Code is a peremptory one and should be complied with, and that when it positively *appears of record*, as it did in both of those cases, that the jury did *not* retire in charge of sworn officers, such failure to comply with the law is reversible error.

But where the record does *not* disclose that the jury

retired in charge of officers *not* sworn, then the only way in which such error can be availed of is by objection and exception duly preserved by a bill of exceptions. The Illinois Supreme Court very early in its history committed itself upon this proposition and has never since departed from its ruling.

In *McKinney* v. *People*, 2 Gilm., 540, the plaintiff in error, who was indicted for murder, urged before the court the point that when the jury retired to consider of their verdict it did not appear from the record that they were placed in charge of a sworn officer, as required by statute. The court in considering the assignment of error said:

"It was not necessary that the record should show that an officer was sworn to take charge of the jury. It was the duty of the court to have sent a sworn officer with the jury, *and if this duty were neglected such fact should appear from a bill of exceptions.*" (p. 554.)

The court in discussing other assignments of error based upon the failure of the record to disclose necessary proceedings, after showing all that the record need state, said.

"If during the progress of the prosecution motions are made and overruled, the facts can be preserved by a *special entry* on the record, or by *bill of exceptions.* In one or the other of these ways it is necessary to preserve every fact that the prisoner may deem essential to his rights, in a fair and regular trial." (p. 551.)

In *Pate* v. *People*, 3 Gilm., 644, where the same question arose, the court said:

"But the record is silent as to the fact whether the separation was with the consent of the prisoner, and it fails to show that the jury were in charge of a sworn officer when they retired to consider of their verdict. These questions arose in the case of *McKinney* v. *People*, 2

Gilm., 540, and we there held that the record need not show what disposition was made of the jury during the progress of the trial, and when they retired to agree on their verdict; that the presumption was that the court performed its duty in such respects and that if the jury were allowed to disperse without the consent of the prisoner, or retire from the bar without being in charge of a sworn officer, *it was incumbent on the prisoner, if he objected to such irregularities, to introduce them into the record by bill of exceptions.* The *presumption* from the record is that the prisoner consented to the separation of the jury, and that the court performed its duty by requiring a sworn officer to accompany the jury in their retirement." (p. 662.)

In *Holmes* v. *People*, 5 Gilm., 478, the same error was assigned and the court said:

"*The record states that the jury retired to consider of their verdict in charge of a sworn officer of the court;* and the presumption is that the court performed its duty by requiring the proper oath to be administered. If the officer was not in fact sworn, the defendants *should have objected* to the irregularity *at the time*, and if not corrected by the court *have taken a bill of exceptions.*"

In *Knouff* v. *People*, 6 Ill. App., 154, the above authorities were followed, the same error having been assigned. The court said:

"It appears *from the record* that the jury retired to consider of their verdict in charge of a deputy sheriff, but it does not appear that the proper oath was *not* administered to him. In criminal cases, it is the duty of the court to place the jury in charge of a sworn officer, but it is not necessary the record should show the fact The presumption is the court performed its duty in that regard. If the officer is not in fact sworn, the irregularity *should be objected to at the time and the point preserved by bill of exceptions.*"

In *McIntyre* v. *People*, 38 Ill., 514, this court quotes from its former opinion in the case of *McKinney* v. *People, supra,* and said:

"It is the duty of the court to send a sworn officer with the jury, and if this duty is neglected, such fact should appear *from a bill of exceptions.* In this case it appears from the evidence *embodied in the bill of exceptions* that the officer having charge of the jury at the time they retired to consider of their verdict was *not* sworn. It, however, appears that on adjournment of the court at a previous time in the progress of the trial, the officer was sworn and charged by the court, but the oath required by the statute was not administered." (p. 519.)

For this and other errors the judgment was reversed. It will be observed, however, that in the above case the failure to administer the proper oath *was embodied in the bill of exceptions*, which was not the fact in any of the preceding cases cited, or in the case at bar.

By way of comparison of recitals in the records, it may be well here to consider the only remaining cases decided in Illinois where this point was directly involved.

In *Lewis* v. *People*, 44 Ill., 462, from which counsel for plaintiff in error quotes at length, the same question was raised. But there, as stated in the opinion, "the *record disclosed the fact* that the officer in whose charge the jury was placed while deliberating on their verdict was *not* sworn."

A little different state of facts arises in the case of *Wilhelm* v. *People*, 72 Ill., 471, where it appeared that during the progress of the trial and before the evidence was all heard, the jury withdrew for a short time, for a necessary purpose, in charge of an officer of the court who was not specially sworn for that purpose. While the court regarded the oath unnecessary, it particularly pointed out that "*no objection was made* to this by plaintiff in error at or before the time, nor did he give his express consent thereto," and judgment was affirmed.

In *Sanders* v. *People*, 124 Ill., 224, the same error was assigned. The court said:

"The evidence shows that when the court adjourned at noon, the officer, who took charge of the jury was sworn by the clerk in the manner required by said section, but after the noon recess the jury returned into court, some further proceedings were had in the trial, the jury then retired 'to consider of their verdict,' but the officer who attended them was not again sworn."

The court held that this was not such an irregularity as would justify a reversal, and distinguished the case from the cases of *Lewis* v. *People, supra,* and *McIntyre* v. *People, supra,* relied upon by plaintiff in error, in the following language:

"In *Lewis* v. *People*, 44 Ill., 452, it appeared that the officer in whose charge the jury were placed while deliberating upon their verdict either was not sworn at all or was not sworn in the mode required by the statute. So also in *McIntyre* v. *People*, 38 Ill., 514, it appeared that 'the oath required by the statute was not administered.' In the case at bar, however, such an oath as the statute provided for *was* administered by the clerk to the officer in charge. The only peculiarity about it was that it was administered an hour or more *before* the jury retired, instead of being taken *at the time* or *'when'* they retired. In *McIntyre* v. *People, supra,* the officer was sworn 'on an adjournment of the court at a previous time in the progress of the trial,' just as in the present case. But there the objection was only as to the *character* of the oath and not as to the time when it was taken."

In *Jackson* v. *People*, 36 Ill. App., 88, the same error was assigned. The court said:

"The officer who was placed in charge of the jury when they retired to make up their verdict was *not* sworn as the statute requires."

The record thus positively disclosing that fact, of course the judgment was reversed.

The Appellate Court, however, in saying further that "it was the duty of the People to see that this was done, or that it was waived by an agreement entered in the minutes of the court," utterly disregarded what had been stated by the Supreme Court with regard to the necessity of the defendant preserving the point by objection and exception thereto, in the cases of *McKinney, Pate, Holmes* and *McIntyre,* above cited, as well as its earlier decision in the *Knouff* case.

It will thus be seen that in the only cases considered in Illinois where this question has been directly involved, the judgment was reversed only in those cases where it appeared of record that the jury retired in charge of officers *not* sworn according to law, as in the *McIntyre* and *Lewis* cases, and that in all other cases where the error was assigned, it not having been based upon objection and exception duly preserved, whether it appeared from the record that the jury retired in charge of a sworn officer or not, the court has declined to reverse the judgment.

Dreyer v. *People, supra.*
McKinney v. *People, supra.*
Pate v. *People, supra.*
Holmes v. *People, supra.*
Knouff v. *People, supra.*
Sanders v. *People, supra.*
Morton v. *People,* 47 Ill., 476.

In other states where the statutes require a special oath similar in form to that required by the Illinois statute, the courts have adhered to the same ruling as to the necessity of making objection to the irregularity at the time and preserving the fact by bill of exceptions.

In *Atterberry* v. *State*, 56 Ark., 515, it was urged that the jury retired from the court room to consider of their verdict in charge of an officer who had not taken the special oath prescribed by a similar statute. The court, recognizing that it presented the most difficult question in the case, and that the oath should be administered, discussed the effect of its omission and the right of the accused to a fair and impartial trial. But, said the court:

"He owes to the court fair dealing as well as candor, and should not be permitted to undo its work on account of omissions which he deemed it too trivial at the time to bring to its attention, and which were not shown or charged to have affected the fairness of the trial or prejudiced his rights. As a general rule, when the court is about to do what it should not do, or to omit what it should do, *the defendant should call attention to the threatened error and object to it*, and if the court then commits it, he must save his exception; and, *unless this is done the act or omission cannot be urged as ground for new trial.* * * * We hold that *it is too late, after verdict, to object for the first time* that the jury retired from the court in charge of an officer to whom the special oath had not been administered, where it appeared that the defendant was present when it retired and neither asked that the special oath be administered to him, nor objected to his taking charge of the jury, and it does not appear that either the officer or jury was guilty of any misconduct."

In *State* v. *Frier*, 118 Mo., 650, the defendant filed three affidavits with his motion for a new trial, as was done in this case, tending to show the separation of the jury and certain other irregularities. The court said:

"None of these matters were preserved by a recital in the bill of exceptions, and the special judge who tried the case has not certified what the truth of the matter was, further than to overrule the motion. As to those matters embraced in the affidavits, we must, *in the absence of*

some exception properly saved or some authoritative recital by the learned judge who heard the case, assume he correctly overruled the motion for a new trial."

We respectfully submit that no more apt expressions can be used to fit the case at bar, in which the retirement of the jury is also predicated upon three affidavits, and in which there is also an absence of an exception properly saved and no recital by the trial judge to confirm the contention that the officers were not properly sworn.

In *United States* v. *Ball*, 163 U. S., 662, where there was a motion for a new trial made upon the ground that the jury were not in charge of a proper officer, duly sworn, the court held that as "*no objection to his taking charge of the jury without a new oath was made at any stage of the trial*," and as there was nothing tending to show that the jury were exposed to any influence that might interfere with the impartial performance of their duties or in any way prejudice the defendant, there was no error in overruling the motion."

2.

THE LAW PRESUMES UNTIL THE CONTRARY APPEARS THAT THE COURT PERFORMED ITS DUTY, AND WHERE THE RECORD IS SILENT IT WILL BE PRESUMED THAT THE JURY RETIRED IN CHARGE OF SWORN OFFICERS.

This doctrine has been recognized in most of the cases heretofore cited. In the *McKinney* case, *supra*, the court said:

"The law presumes till the contrary appears that the court performed its duty. That it by no means follows because the record is silent as to the disposition of the jury, that the judge neglected so important a duty as to

keep the jury, charged with the life of the prisoner, from all extraneous influences." (p. 553.) * * * "We believe, that as the prisoner was in court, in person and by his counsel, that it was his duty to object to the dispersion of the jury, if indeed they did disperse; and that in the absence of all proof to the contrary we will presume that the court below performed so obvious a duty." (p. 556.)

In the *Pate* case, *supra*, the court said:

"The presumption from the record is that the prisoner consented to the separation of the jury, and that the *court performed its duty by requiring a sworn officer to accompany the jury in their retirement.*" (p. 662.)

In the *Holmes* case, *supra*, the court said:

"The presumption is that the court performed its duty in that regard."

This same presumption has been recognized in other states.

State v. *Pitts*, 11 Ia., 343.
State v. *Ryan*, 13 Minn., 370.
Clark v. *State*, 55 Tenn. (8 Baxt.) 591.
People v. *Waters*, 1 Idaho, 560.
Bennett v. *Comm.*, 8 Leigh, 745.

In this connection, as supporting this presumption, attention may be called to the ruling that a *recital in a record* that the officers placed in charge of a jury were *sworn*, sufficiently shows that they were *duly sworn*.

Holmes v. *People*, *supra*.
State v. *Nelson*, 132 Mo., 184.
Moore v. *State*, 96 Tenn., 209.
Lancaster v. *State*, 91 Tenn., 267.

3.

COURTS ARE NOT DISPOSED TO REVERSE UPON A MERE CLAIM OF SUCH IRREGULARITY, ESPECIALLY IN THE ABSENCE OF ANY SHOWING OF INJURIES RESULTING THEREFROM.

Sanders v. *People*, *supra*.
Wilhelm v. *People*, 72 Ill., 468.
Adams v. *People*, 47 Ill., 881.
State v. *Crofton*, 89 Ia., 109, 120.
Hittner v. *State*, 19 Ind., 48.
State v. *Hayes*, 78 Mo., 307.
State v. *Hays*, 78 Mo., 600.
State v. *Frier*, 118 Mo., 648.
People v. *Johnson*, 46 Hun., 667.
State v. *Poindexter*, 23 W. Va., 805.
Jarnagin v. *State*, 18 Tenn. (10 Yerg.), 529.
Stone v. *State*, 23 Tenn. (4 Humph.), 27.
U. S. v. *Ball*, 163 U. S., 662.

In the *Sanders* case, *supra*, the oath was administered before the noon recess and the jury did not retire until in the afternoon. The court said:

"The irregularity here indicated is too slight to be regarded as a ground for reversal." (p. 225.)

In the *Adams* case, *supra*, the misconduct of the jury was complained of, but in the absence of any showing of prejudice to the prisoner, the irregularity was not regarded as sufficient to justify a reversal.

In the *Wilhelm* case, *supra*, the court said:

"It is not claimed that the jury, while absent, were tampered with, or subjected to any improper influences,

and as plaintiff in error suffered no injustice by this action of the court, he has no cause to complain."

In *State* v. *Crofton, supra,* although the court held that under the statute of that state the administration of a special oath to the bailiff was mandatory, and in absence of a record as to the taking of such oath it would be presumed that the law had been complied with, yet as the error could not be availed of under the code, except upon the ground that the defendant had not received a fair and impartial trial, the court, as to that proposition, said:

"The bailiff in charge of this jury, so far as the record discloses, performed faithfully every duty which the law enjoins upon such officer. He could have done no more had he taken the oath provided by the law. No prejudice resulted from his neglect of duty."

(All of these facts appear in the case at bar from the affidavits of the bailiff. Rec., 34, 35.)

In *State* v. *Hayes,* 78 Mo., 307, an assignment of error that the jury were permitted to retire without the administration of the oath to the officer in charge, as provided in the statute similar to that of Illinois, the bill of exceptions showed that the jurors retired to consider of their verdict to the jury room and were there one and a half hours before the sheriff was sworn; but he was sworn before he had any communication with the jury and before the verdict was rendered. The court said:

"The section of the statute in question was designed to secure the jury against any outside influence, and even that of conversation with the officer in charge, and in a case where this precautionary oath is not administered, the court ought to be well satisfied that no harm resulted therefrom to the prisoner."

The court held that inasmuch as it affirmatively ap-

peared that the jury retired to the proper place assigned for them, and that the officer was sworn before he had any communication with the jury and before the verdict was rendered, there was nothing "to give color to any possible extraordinary influence upon the jury" and that it was not reversible error. (p. 314.)

In the same report, *People* v. *Hays*, 600, the same error was assigned, the record showing that the sheriff who took the jury in charge when they retired to consider of their verdict was not sworn as provided by the statute. The court said:

"This presents a question of much gravity and difficulty. * * * The record in this case shows that the jury retired, under charge of the court and sheriff, and there is no proof whatever that he or any one else even spoke to the jury during their retirement. To vacate the verdict in such a state of the case *would be an observance of the mere letter of the law without an intelligent recognition of its spirit.*" (p. 608.)

In *State* v. *Frier*, 118 Mo., 648, the court said:

"As to the failure to administer the oath to the sheriff when the jury finally retired to consider of their verdict, as the evidence shows beyond contradiction that the sheriff in no manner communicated with the jury, it cannot even be inferred that his failure to take the additional oath prescribed in section 4210 affected the verdict, and hence is no ground for a new trial." (p. 651.)

In *People* v. *Johnson*, 46 Hun., 672, the oath required by the statute was not administered. The court held that "the omission to administer the oath was an irregularity merely and did not require or justify a new trial unless there was some opportunity to conclude that the defendant was prejudiced."

In *State* v. *Poindexter*, 23 W. Va., 813, the court said that while no special oath was required, yet it was cus-

tomary for the court to administer a special oath, and added:

"It is not pretended that the jury had not been kept together, or the sheriff or his deputies had not properly discharged their duties to the prisoner, or that he had been in any manner injured by acts of the sheriff or his deputies. We are of the opinion, therefore, that the court did not err in overruling the prisoner's motion."

In *Jarnagin* v. *State,* 18 Tenn. (10 Yerg.), 529, the court said:

"It is said that the jury retired to consider of their verdict into a room of the building in which the court was held, accompanied by an officer. It does not appear that an officer was necessary, that the jury improperly separated or that any communication of any sort was had with them by persons not of their body, so that there is no error in this."

In *Stone* v. *State,* 23 Tenn. (4 Humphrey), 27, it was shown by the bill of exceptions that the sheriff, who was not the sworn officer of the jury, had charge of them at a period of time when the constable was absent, but that he had said nothing to them about the trial. The court, after reviewing the precautionary measures to bring about fair and impartial verdicts, and stating that if the jury had been disqualified from considering the case properly it would have been the duty of the court to have awarded a *venire facias de novo,* said:

"That he didn't do so, we must in the absence of proof come to the contrary conclusion and hold that the slight irregularities complained of were entirely innoxious to the prisoner. As to the separation of the jury complained of and the introduction of the sheriff into their room, all that is necessary to observe, in view of the principle just laid down, is that it is shown satisfactorily to our minds, that whatever little separation took place was casual and of no importance, that there was no tampering or oppor-

tunity for tampering furnished by it, and the sheriff expressly swears that he did not speak to the jury about the case."

See, also,

United States v. *Ball*, 163 U. S., 662, 674, before quoted.

4.

THE RECORD IMPORTS VERITY, AND ITS CONCLUSIVENESS CANNOT BE IMPEACHED BY AFFIDAVIT.

Eastman v. *People*, 93 Ill., 112.
Henning v. *State*, 106 Ind., 386, 390.
Polin v. *State*, 14 Neb., 540, 549.
State v. *Frier*, 118 Mo., 650.
Van Houston v. *People*, 22 Colo., 53.

In the Eastman case, *supra*, where, as it appears from the bill of exceptions, the defendant made an application to the court to address the jury, which it in effect denied, this court said:

"Admitting that this amounted to a refusal on the part of the court to permit the accused to appear in person in her own behalf, and that she was thus deprived of a constitutional right, still upon the record before us we cannot say there was error. The record wholly fails to show that any exception was taken to the rulings of the court with respect to her application to go before the jury in person, and it therefore follows this court is precluded from reviewing the action of the court in regard to it. This is so well settled and understood by the profession that argument or citation of authority would be useless. * * * Can there be anything more thoroughly settled and universally understood than that a court of review can only look *at the record* before it, and that in determining the rights of the parties thereto *it must accept the record as absolute verity?* Even if the members of the

court personally know a fact important to the rights of a party, which by innocent mistake or fraudulent design has been omitted in making up the bill of exceptions, they would be powerless to act on such knowledge. We must therefore conclusively presume, in this as in all other cases, *that the bill of exceptions speaks the facts as they really exist.*"

In the *Henning* case, *supra*, the defendant was convicted of murder. It was urged that the jury was permitted to separate during the trial without his knowledge or consent or that of his counsel. The bill of exceptions recited these facts and the further fact that the attention of the court was not called to the absence of the defendant and his counsel until the following morning. Both the defendant and his counsel filed affidavits in support of a motion for a new trial to the effect that the order for such separation was made in the absence of the defendant and his counsel, and further setting up that the defendant was forcibly removed from the court room. The court said:

"But if we treat it as a statement of fact, it cannot prevail against the statement of the court as to what took place, since it is a familiar rule that where the court puts on record a statement of what occurred in its presence, *it cannot be overcome by the affidavit of a party.*" (p. 390.)

In the Missouri case of *State* v. *Frier*, *supra*, three affidavits in support of a motion for a new trial tending to show the separation of the jury in a murder case, were held unavailing as against the record in which these matters were not preserved in a bill of exceptions, and it was assumed that the trial judge as to those matters correctly overruled the motion for new trial.

In *Polin* v. *State*, 14 Neb., 549, affidavits in support of a motion for new trial, charging the separation of the jury, upon a murder case, were unavailing.

In *Van Houston* v. *People,* 22 Colo., 57, it was undertaken to show by affidavits that during the examination of one of the jurors the defendant voluntarily absented himself from the court room for a few minutes. The court said:

"The record shows the personal presence of the defendant, and it cannot be contradicted in the manner resorted to in the case."

Even the affidavit of the trial judge to the fact that the record is erroneous and stating that the parties waived a jury was held not to change the record.

Smith v. *Brannan,* 13 Cal., 115.

The record in the case at bar discloses, as before stated, that *"the jury heard further arguments of counsel that the instructions of the court, and retired in charge of sworn officers to consider of their verdict."* (Rec., 19.) It must therefore be regarded as stating the fact that the officers were *sworn.* As heretofore shown, every presumption to support it will be indulged, and from the recital that the officers were sworn it will be presumed that they were *duly* and *regularly* sworn.

If the record does not state the truth, then the only way it could have been changed was by amendment.

Such recourse was open to the plaintiff in error. The term had not expired when he entered the motion for a new trial, and one of his counsel claimed to have been cognizant of the irregularities at the time. He so stated with great particularity in his affidavit. (Rec., 32.)

Had an application been made during the term, the court below might have entertained the affidavits filed for that purpose. But the record cannot be impeached by them.

In fact, if the court had believed from the affidavits filed that there was error in making up the record, the record could have been amended "by direction of the court without any formal application for that purpose."

Weed v. *Weed,* 25 Conn., 337.

Kelly v. *High,* 29 W. Va., 381.

As stated in *Weed* v. *Weed, supra:*

"Whether there was a mistake in the record was a question of *fact* for the court below, to be established, as any other fact in a court of justice, by proper evidence, * * * and it was for the court upon that evidence to say whether in fact a mistake had been made which required correction."

Presumably the court below, from the affidavits and evidence before it, *deemed the record correct* in stating that the jury retired in charge of sworn officers.

Therefore, whatever may have been the facts, the record not having been amended, it must be taken as conclusive. Its truth cannot be questioned.

The extraordinary procedure resorted to in this case was by procuring the affidavit of the very clerk who made the record to swear that it was not true. If a record may thus be successfully impeached, it is difficult to see what safety there is in judicial proceedings and what guaranty there may be in the future as to the verity of court records.

If such be the practice then he or some other officer of the court, or some outsider, pretending to be cognizant of the real fact, may after an adverse verdict impeach any other entry in the record, of a necessary proceeding in the trial, like an arraignment, or a plea, or the swearing of the jurors. Such practice would put a premium on rascality.

All that any defeated party or convicted criminal need then do to impeach and discredit the record of his case would be to induce, by corrupt methods or otherwise, some dishonest clerk or willing detective to make affidavit that some prerequisite to a legal trial has been omitted or irregularly performed, and thus defeat the ends of justice. No court will lend its sanction to a practice which invites fraud and corruption into judicial proceedings.

The action of trial court in not reciting the fact to the contrary in the bill of exceptions, was tantamount to deciding the fact as it stood of record. While affidavits stating the bailiffs were not properly sworn have been brought into the record by the bill of exceptions, they do not thereby change the record already existing, to the effect that the officers in charge of the jury were duly sworn. They have no more effect here than they had in the court below, namely, *that of questioning the accuracy* of the record, and if the record was not accurate, plaintiff in error's only recourse was to have it amended by the court who heard the affidavits and evidence. In fact, after the Illinois Supreme Court had decided this case adversely to the plaintiff in error, he sought, in view of the holding of the court that the question was not properly raised upon the record by "objection or exception taken by the defendant at the time of the retiring of the jury that the officers in charge of it were not sworn, but the question was raised by him for the first time in his motion for new trial," and in view of the further holding that said fact "may be shown by affidavits heard on the motion for new trial embodied in the bill of exceptions (the inconsistency of which holdings was pointed out in a separate opinion by Mr. Justice Cartwright) to amend the record by a finding of the trial court based upon such affidavits

to the effect that the officers in charge of the jury were not sworn as required by law. Such amendment was allowed and upon the motion for a rehearing before the Supreme Court, a diminution of the record in this respect was suggested. But the court held that the amendment allowed by the trial court was improper; that while, during the term, the trial court might have considered such affidavits for such purpose, after the expiration of the term it could not resort to the information furnished by such affidavits to change the record.

Dreyer v. *People*, 188 Ill., 64.

Such decision was more in keeping with the separate opinion of Mr. Justice Cartwright, which pointed out, as before stated, the apparent inconsistency of the main decision, and might also call in question the soundness of that decision in also holding that the recital of the record that the officers in charge of the jury were sworn, was an unnecessary recital and perhaps not properly a part of the record.

Is a record of a case limited to only those matters which must necessarily appear, or to matters which must appear to show jurisdiction? We are not aware of any rule so stringent. On the contrary, it appears from many of the very cases we have been considering, and especially the Illinois cases, that the very point urged with respect to the administration of the oath to the officers in charge of the jury has been decided from the *recital* with respect thereto, *and it does not* appear that it was a mere fact brought into the record by a *bill of exceptions*, but in most, if not all, of the cases appears, as in the case at bar, to have been a *recital in the entry made at the time*.

Can it be that an act, which is not only a part of the

necessary procedure of a criminal case, but is an act to be performed *by the court* or under its direction, and which if omitted and the fact so appear of record, vitiates the proceedings, is not a part of the record because it is not absolutely necessary for the record to state it?

We apprehend that it is a safe principle that the entry in the records of the court of any act essential either to its jurisdiction or a legal trial, becomes a part of that record, which cannot be disregarded.

It is not like an objection, an affidavit or a motion, the act of *one of the parties*, but an act of *the court* independent of them, which is thus recorded. In other words, it is what it purports to be, the record of the *court's action* with respect to essential steps in a legal trial.

5.

THE ACCUSED HAS NO RIGHT TO STAND BY AND SUFFER IRREGULAR PROCEEDINGS TO TAKE PLACE, AND THEN ASK TO HAVE THE PROCEEDINGS REVERSED ON ERROR, ON ACCOUNT OF SUCH IRREGULARITIES. IF HE NEGLECTS IN PROPER TIME TO INSIST ON HIS RIGHTS, HE WAIVES THEM.

Dreyer v. *People*, 188 Ill., 40.
McKinney v. *People*, 2 Gilm., 556.
Chase v. *People*, 40 Ill., 352.
Eastman v. *People*, 93 Ill., 113.
Dyer v. *People*, 84 Ill., 624.
Kelly v. *People*, 132 Ill., 371.
Atterberry v. *State*, 56 Ark., 515.
Henning v. *State*, 106 Ind., 386, 392.
Waterman v. *State*, 116 Ind., 51.
Polin v. *State*, 14 Neb., 540, 549.
Hunter v. *People*, 43 Ga., 483.

It is one of the extraordinary features of the case at bar that one of the counsel for defendant below went so far to render positive his contention that the bailiffs were not properly sworn, in form or in time, as to assert in his affidavit that he had the very matter in mind when the clerk administered the oath to the bailiffs, *having devoted much study to it*, and particularly observed the neglect complained of. (See affidavit of Attorney Austrian; Rec., 32.) In other words, observing, as he claims, irregular proceedings, which, if properly shown by the record, would vitiate the proceedings, without rendering any complaint or calling the attention of the court thereto in time to correct the error, he elected to go on and *speculate* upon the verdict, intending doubtless to receive the benefit of it if an acquittal, and claim error if a conviction.

In the *McKinney* case, *supra*, upon the very point in question the court said:

"A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place and then ask to have the proceedings reversed on error on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglect, in proper time, to insist on his rights, he *waives* them." (p. 556.)

In *Atterberry* v. *State*, 56 Ark., 515, the defendant urged, as in this case, that the oath was not administered to the officers in charge of the jury. The court said:

"He owes to the court fair dealing as well as candor, and should not be permitted to undo its work on account of omissions which he deemed it too trivial at the time to bring to its attention, and which are not shown or charged to have affected the fairness of the trial or prejudiced his rights. As a general rule, when the court is

about to do what it should not do, or to omit what it should do, the defendant should call attention to the threatened error and object to it, and if the court then commits it, he must save his exception, and unless this is done the act or omission cannot be urged as ground for a new trial. This rule applies to the exclusion of proper or the admission of improper evidence; to the refusing of proper or the giving of improper instructions. *It rests upon the duty of dealing fairly with the court, which forbids that a losing litigant should complain of errors which the court might and presumably would have avoided, or cured in apt time, if they had been called to its attention.* * * * We hold that it is too late, after verdict, to object for the first time that the jury retired from the court in charge of an officer to whom the special oath had not been administered, where it appeared that the defendant was present when it retired and neither asked that the spespecial oath be administered to him nor objected to his taking charge of the jury, and it does not appear that either the officer or the jury was guilty of any misconduct. It appears from the record in this case that the jury retired in charge of an officer acting under the general oath of his office, and that the defendant and his attorney were present, but it does not appear that he asked the court to administer the special oath, or objected to the officer taking charge of the jury."

In *Henning* v. *State*, 106 Ind., 393, after reviewing various authorities on waiver, the court said:

"These authorities clearly establish the general doctrine that if a defendant has knowledge of a matter affecting his rights and fails to ask a ruling upon it, or if he fails to avail himself at the earliest opportunity of objections known to him, he cannot afterwards successfully complain. * * * Of course, this principle can have no application where the ground of complaint, whether it be the action of the court or the misconduct of a jury, is not known to the accused until after verdict, *but it does apply where, as here, the action of the court and the conduct of the jury are fully known to the defendant.*"

In *Waterman* v. *State*, 116 Ind., 51, the court said:

"It is insisted, next, that the court erred in overruling appellant's motion for a new trial on account of the alleged misconduct of the jury in permitting the presence of the bailiff in the jury room during their deliberations. All that appears of record upon that subject is the affidavit of appellant's counsel. * * * In the present case, however, the affidavit of appellant's counsel discloses the fact that counsel saw the bailiff go into the jury room without any invitation or signal from within, and that this was repeated again and again in his presence, without protest or objection, although counsel was present in court at the time. In whatever light counsel may have regarded the conduct of the bailiff after an adverse verdict was returned, it does not seem to have impressed him as being of sufficient consequence at the time as to justify mention to the court. *Misconduct on the part of anyone connected with the trial, which is known to and acquiesced in without objection by the party or his counsel, as here, even though it be of a character which might otherwise vitiate the verdict, cannot afterwards be made available as ground for setting aside the verdict.*"

In *Polin* v. *State*, 14 Neb., 540, affidavits showing separation of a jury (in a murder case) were filed in support of a motion for a new trial. The fact was known at the time by prisoner's counsel, yet "no complaint was made to the judge, but the trial was permitted to proceed without objection till after verdict." The court said:

"If the separation were thought to be at all prejudicial to the prisoner, it ought to have been brought to the notice of the judge at once, on discovery, so that an investigation could have been made, to the end that, without further fruitless expense, if justice required it, the trial could have been stopped, that jury discharged and a new one impaneled to try the case. *Parties litigant, even defendants in criminal cases, must deal fairly by the court. They are not permitted to withhold information on matters transpiring in the progress of a trial, whether prejudicial or otherwise, and then without objection permitted to pro-*

ceed to a conclusion, and then take advantage of them. Generally all objections not *jurisdictional* as to the subject of litigation must be made at the first opportunity, or they are deemed to be waived. The rule in such cases is, *to take chances of a favorable result, and then, if disappointed, for the first time complain.*" (p. 550.)

In *Dyer* v. *People*, 84 Ill., 624, where a party failed to object to an apparent variance at the trial, the court said:

"A party will not be permitted to lie by and reserve such technical objection to be urged on error in this court."

But it may be contended that the provisions of the statute requiring the officer in charge of jurors, when they retire, to be sworn, are such that there can be no waiver except by express consent entered upon the minutes of the court. This, however, can only be maintained from a misapprehension of its meaning. It states that when the jury retire to consider their verdict, the officer shall be sworn to attend the jury, to keep them together, suffer none to speak to them, and return them into court after verdict. (Sec. 14, Div. XIII, Ch. 38, Ill. R. S.) Thus far it requires no more than is required under the common law practice (1 Bish. Crim. Pro., Sec. 998; 1 Chit. Crim. Law, 632) according to which all criminal trials are still required to be conducted, except when the statute points out a different mode. (Ill. R. S., Ch. 38, Div. XIII, Sec. 8.) The statute referred to contains a proviso that the parties may, in cases of misdemeanor only, "agree, which agreement shall be entered upon the minutes of the court *to dispense with the attendance* of an officer upon the jury, or that the jury when they have agreed upon their verdict may write and seal the same and after delivering the same to the clerk *may separate.*"

Although this provision for dispensing with the attendance of an officer and permitting the jury to separate after verdict seems to relate to cases of misdemeanor only, and does not contemplate that these matters may be done in a case of felony, yet the courts have held both requirements by neglect to object in proper time to have been waived. However, the administering of an oath to the officer and the requirement of his attendance upon the jury are two different matters. If it be held that under our statute his attendance upon the jury in a case of felony cannot be dispensed with or even waived, yet there is nothing in the statute to preclude the application of the doctrine of waiver to the administration of the oath to the officer that may be in attendance upon the jury. In other words, his *attendance* can be dispensed with only by an agreement entered upon the minutes of the court, but the provision in no respect changes the requirement of an *oath*, which was as obligatory before the passage of the statute as since, and if it could have been waived prior to the passage of the statute or under the common law practice, as already shown, there is no reason in logic why it cannot be waived since the enactment of the statute, which does not expressly provide that a *dispensing of the oath* must be by consent.

Equally important rights to the defendant, even his constitutional rights, have been held to have been waived.

In *Chase* v. *People*, 40 Ill., 352, it appeared that one of the jurymen was an alien, but it was held too late to assign that as error, the defendant failing to exercise his right of challenge for cause and to take exception.

In the *Eastman* case, *supra*, it was held that the Supreme Court was precluded from reviewing the action of

the Circuit Court in denying the defendant the privilege of making a statement in person to the jury after her counsel had spoken, when the record failed to show that any exception was taken to the ruling.

In *Kelley* v. *People*, *supra*, the court the, although the statute does not so provide, that the defendant should have made a demand before arraignment for a copy of the indictment, and upon being refused should have excepted and presented the facts of the demand and refusal and exception by bill of exceptions, and not having done so could not be heard to complain. (p. 371.)

The statute with respect to the duty to furnish the accused such copy (Sec. 1, Div. III, Ill. R. S., Ch. 38) in requiring that every person charged with crime "shall be furnished previous to his arraignment with a copy of the indictment and a list of jurors and witnesses" is as peremptory as the statute in question; and yet, this important requirement was held to have been waived in the above case.

In the following cases, the constitutional right of accused to be confronted by the witnesses was held to have been waived:

Reynolds v. *U. S.*, 98 U. S., 145.
U. S. v. *Sacramento*, 2 Mont., 239.
Williams v. *State*, 61 Wis., 281.
Rosenbaum v. *State*, 33 Ala., 354.
Price v. *State*, 36 Miss., 533.

In the following cases his constitutional right to be present at the trial was held to have been waived.

Sahlinger v. *People*, 102 Ill., 241.
State v. *Kelly*, 97 N. C., 404.
Fight v. *State*, 7 Ohio, 327.
State v. *Wamire*, 6 Ind., 357.
Barton v. *State*, 67 Ga., 653.

In the following cases the failure to object to the separation of a jury in the trial of a capital case, when known by the defendant, was held to have been waived.

Henning v. *State*, 106 Ind., 386, 392.
Polin v. *State*, 14 Neb., 540, 549.
U. S. v. *Gilbert*, 2 Sumner, 19.

II.

Not Twice In Jeopardy.

THE PREVAILING RULE IS THAT THE DISCHARGE OF A JURY WITHOUT THE CONSENT OF THE DEFENDANT, BECAUSE, AFTER MATURE DELIBERATION, THEY ARE UNABLE TO AGREE UPON A VERDICT, IS NOT AN ACQUITTAL AND DOES NOT ENTITLE THE DEFENDANT TO IMMUNITY FROM FURTHER PROSECUTION. WHETHER THEY CAN AGREE IS A QUESTION FOR THE SOUND DISCRETION OF THE COURT.

As appears in the statement of facts, the contention that the jury having been discharged for inability to agree at a former trial, and the defendant having again been placed on trial was thus twice put in jeopardy, rests solely upon these facts as they appear from the record, namely, the entry upon the record September 2, 1899, declaring that the jury "*being unable to agree upon a verdict are thereupon by order of this court discharged from further consideration of this cause;*" and the evidence of the witness Bachrach that the jury retired to consider their verdict on September 1st, about 5 P. M., and were discharged by the court the following morning about 10 A. M., which also appears of record excepting as to the recital of the hours. Counsel for plaintiff in error, in his argument upon this question, predicates his proposition

upon another alleged fact, which does not appear of record but proof of which was expressly excluded, namely, "the objection and protest of defendant to such discharge." However, it would matter little whether that were a fact, as the authorities are conclusive upon the question that where the necessity exists for the discharge of the jury the prisoner's consent is not required, and that the court is the judge whether the necessity exists.

The diversity of opinion upon this subject has arisen mostly upon the question as to whether the inability of the jury to agree is of itself such a *necessity* as to render their discharge legal without the consent of the defendant. One class of cases, namely, those relied upon by plaintiff in error, restrict the right to discharge the jury without such consent to cases of so-called "legal" or "physical" necessity. Another class of cases, far greater in number and now recognized as the better authority, regard the inability of the jury to agree, after reasonable or mature deliberation, as such a necessity as justifies the court in discharging the jury. Some of these authorities declare that such necessity must have appeared from the record to have existed; but that the entry of the fact that the jury are unable to agree upon the records of the court implies a finding of the court to that effect. There is still a further division of authorities as to whether it is a discretionary power with the court. However, the courts denying that it is a discretionary power hold that the entry upon the record that the jury are unable to agree involves the finding of the fact that such necessity existed.

We shall not attempt to cite all the authorities favoring the propositions above laid down. We shall quote enough to demonstrate that the weight of authority is in

support of our proposition, and is so recognized by the principal text writers.

Proffatt on Jury Trials, Section 484, lays down the doctrine in the following language:

"It was formerly held by many of the American courts that in capital cases it was no sufficient ground to warrant the discharge of a jury without the consent of the accused, when they were unable to agree upon a verdict; and that if a jury were discharged, without the prisoner's consent, before they had agreed, it constituted a bar to any further prosecution for the offense. But in these cases it is admitted that there may be sometimes a necessity so invincible and uncontrollable as to justify the discharge of a jury in capital cases."

Section 485:

"The necessity justifying a discharge may be variously estimated; for what one might consider to be a case of justifiable, uncontrollable necessity might by another be deemed capable of avoidance and control, and by no means insuperable. The view now obtains that a 'necessity' of that extreme and uncontrollable character exists to justify the discharge of a jury, when, after a reasonable confinement, and after full instructions, the jury find an utter inability to come to an agreement in respect to their verdict."

1 Bishop on Criminal Law (6th Ed.), Sec. 1033, declares the law to be as follows:

"In England and Ireland, and at present in the greater part, if not all, of the states, when a reasonable period for discussion and reflection has been given the jury, and they have in open court declared themselves unable to come to an agreement, and the judge is satisfied of the truth of the declaration, they may be discharged and the prisoner held to be tried anew."

And this doctrine is applied as well in felony as in misdemeanor; and in support of this position the author cites a long list of cases.

Archbold, in his work on Criminal Practice and Pleading, declares, Vol. 1, p. 593, that

"The general rule is that the jury must be kept together from the time they are first charged with the prisoner or defendant until they deliver their verdict, unless the prisoner consents to their being discharged or for causes occurring in which the judge, from necessity, is obliged to discharge them. If they cannot agree upon their verdict and they appear not likely to do so, the judge, chairman or recorder, in the exercise of his discretion, may discharge them as soon as it becomes a matter of necessity, of which he is the judge, and he usually discharges them after they have been one night locked up in the jury-room, deliberating on their verdict."

In Graham & Waterman on New Trials, Vol. 11, page 118, the rule is laid down in the following language:

"So long, therefore, as it is the truth that is sought by the verdict, and not an empty form, the protracted confinement of juries who are unable to agree is more calculated to defeat than to promote the ends of justice; and their discharge, under such circumstances, ought not to operate as a bar to further proceedings."

And, continuing, on page 122, the same author says:

"The discharge of a jury in a criminal case, without agreeing on a verdict, is a matter resting in the sound discretion of the court in which the trial is had."

On page 127, same volume, the author quotes with approval Judge Crabb, who declares in the case of *The State* v. *Waterhouse*, Martin & Yerg. (Tenn.), 278:

"In the United States I find a weight of coincident adjudications, which I cannot, I believe, with propriety resist. The Supreme Court of Massachusetts, the Supreme Court of New York, and above all the Supreme Court of the United States, fitted more than any other tribunal, from the necessary habits and researches of its members, to decide upon American constitutional law, have, without, so far as I can discover, a dissenting voice, all held

that a court, in the exercise of a sound discretion, may discharge a jury, even in a capital case; and that the defendant may be tried again."

In *U. S.* v. *Perez*, 9 Wheat., 579, it was held that the discharge of the jury from giving a verdict in a capital case without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offense. Mr. Justice STORY said:

"We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, if in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated. * * * We are aware that there is some diversity of opinion and practice on this subject in the American courts, but after weighing the question with due deliberation we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

We will briefly review other decisions of like import.

ALABAMA.

While in most of the cases decided in Alabama the question has arisen whether the jury could be discharged before the end of the term, and the courts have held, as in *Ex parte Vincent*, 43 Ala., 402, that the defendant was entitled to he whole term to have his case disposed of *"unless some necessity intervened which rendered this impracticable or impossible,"* yet the courts of that state have distinctly recognized that such necessity "need not be physical," and in *Battle's* case, 7 Ala., 259, the jury were discharged on the same day the case was submitted to them for inability to agree, the court above holding

"that it would presume (the contrary not appearing) that a reasonable time had been allowed for the jury to consider of their verdict."

In *Barrett* v. State, 35 Ala., 406, where *Battle's* case was approved upon a similar state of facts, it recognized and said:

"That a case which the law recognizes as a moral necessity does exist when the business of the court, other than the particular criminal case, has been disposed of, and the jury have so long considered of their verdict, without agreeing, as to indicate the absence of all probability that they would unite upon a conclusion; and in the determination of the question whether the jury have considered the case for a reasonable time, or until there is no probability that they will agree, *something must be left to the judgment and discretion of the court which tries the case.*"

CALIFORNIA.

In *Ex parte McLaughlin*, 41 Cal., 211, the record recited that the jury stated their inability to agree, and against the prisoner's objection were discharged. It was contended that such discharge was without "legal necessity."

The court said:

"Upon this point the authorities furnished by adjudicated cases in our sister states largely preponderate in the affirmative, and the most prominent of which are: *Comm.* v. *Purchase*, 2 Pick., 520; *People* v. *Goodwin*, 18 Johns. (N. Y.), 187; *Hoffman* v. *State*, 20 Md., 425; *State* v. *Updike*, 4 Harr. (Del.), 581; *State* v. *McKee*, 1 Bailey (S. C.), 655; *Wellford* v. *State*, 23 Geo., 1; *State* v. *Barnett*, 35 Ala., 406, substantially overruling the case of *Ned* v. *State*, 7 Porter, 210, and other cases previously decided in the same state and holding the opposite view; *Price* v. *State*, 36 Miss., 533; *Dobbins* v.

State, 14 Ohio St. R., 492; *State* v. *Walker,* 26 Ind., 346, and *State* v. *Nelson,* 26 Ind., 366, overruling the case of *State* v. *Miller,* 8 Ind., 326, and other cases in the same court holding contrary doctrine upon this point.

"Opposed to the above authorities upon the point in hand, I have been able to find but *four* states, viz., Pennsylvania, Virginia, North Carolina and Tennessee; and the courts of Pennsylvania and Virginia both hold the affirmative in all criminal prosecutions for less than capital offenses. * * *

"The action of the court in discharging the jury in the present case, and holding the petitioner for re-trial, is sanctioned by our statute, by the uniform practice of all our courts and by a large preponderance of judicial authority from our sister states, and is, in my judgment, in accordance with enlightened principles of law and justice, not in contravention of any right secured by our constitution, and should be sustained."

It is true that there was an express provision in the statute of California, authorizing a court to discharge a jury "if it satisfactorily appear that there is no reason or probability that the jury can agree." But that statute was claimed by the relator, McLaughlin, in that very case, to be unconstitutional in that it deprived the prisoner of his constitutional right of not being placed twice in jeopardy, as provided for in the constitution of that state. In other words, it was held in that case, that neither the statute nor the action of the court pursuant thereto, deprived the prisoner of his constitutional rights of not being placed in jeopardy the second time.

Connecticut.

In the case of *The State* v. *Woodruff*, 2 Day (Conn.), 504, the Supreme Court of that state approves of practice prevailing in the State of New York, under which a

court may discharge a jury when it is unable to agree, in the following language:

"The point now under consideration has undergone a very full and able discussion in the State of New York, and the right to discharge a jury who are unable to agree and afterwards being the defendant to trial before another jury has been asserted and established."

And quotes English authorities, showing "that the jury may be discharged in capital cases" and "that in cases not capital the prisoner's consent is not necessary."

Delaware.

In *State* v. *Updike*, 4 Harr., 581, where the jury was discharged for inability to agree without the prisoner's consent, the contention that a second trial placed him twice in jeopardy was abandoned as untenable, upon the authority of *U. S.* v. *Perez*, 9 Wheat., 579.

Georgia.

In *Williford* v. *State*, 23 Ga., 1, against the objection of the prisoner, the court on its own motion entered the order:

"It appearing to the court that the jury impaneled and sworn to try this case are unable to agree, it is therefore ordered by the court that a mistrial be declared and awarded, and that the jury be discharged."

Upon the action of the court in refusing to discharge the prisoner, the Supreme Court said:

"Anciently the doctrine was much more rigid upon this subject than at present. * * * At the present day the question seems to be left pretty much to the *discretion* of the judge, under his responsibility to the county for any abuse of his authority; and we are not

prepared to hold that this discretion should be otherwise limited." * * *

In the case of *Lester* v. *The State*, 33 Ga., 329, the jury being unable to agree upon a verdict, the court, on motion, entered an order reciting the inability of the jury to agree after long deliberation, and declaring a mistrial and discharging the jury. When the case was called at the ensuing term the prisoner pleaded former acquittal, on the ground that the mistrial was declared by the court without the consent of the accused. The state demurred to the plea, the court sustained the demurrer and ordered the plea stricken out and the defendant to plead over. The Supreme Court declared:

"We are clear that the decision of the court below was right. Whenever a jury in a case like this is discharged by the court from the further consideration of the cause, because of the impossibility of the jury's agreeing on a verdict, or on account of the illness of a juror, the prisoner or the court, such a discharge is an *absolute necessity*, and does not and cannot operate as an acquittal of the accused."

ILLINOIS.

This precise question does not seem to have been raised in the Supreme Court of Illinois until the rendition of its decision in the case at bar.

The Appellate Court, however, had previously, in the case of *Logg* v. *The People*, 8 Ill. App., 106, inclined to the position taken by the courts of New York, Massachusetts, Texas, and the other states herein referred to. On page 106 of that volume the Appellate Court declares that:

"Where an obvious necessity arises from some matter occurring during the trial that could not be foreseen or

prevented for discharging the jury, the court has the undoubted power to discharge them without releasing the defendant, even though such action be taken against his objection, *as where the jury are unable to agree,* and longer confinement would be unreasonable."

(Citing *Nugent* v. *The State*, 4 Stewart & Porter, 72.)

INDIANA.

In *State* v. *Nelson*, 26 Ind., 366, whether the defendant ant had been put in jeopardy by a discharge of the jury on the court's motion, defendant objecting, because the jury stated that there was no probability that they could agree, the court practically disapproved of any previous rulings in that court to the contrary by saying:

"Differing, then, from the spirit of what has been heretofore held in this state, and from the doctrine held in *Pennsylvania, Tennessee, Virginia, North Carolina* and *Alabama*, we are, however, in accord with the Supreme Court of the United tSates, and of *Massachusetts, Mississippi, New York, Illinois* and *Kentucky.*"

In *State* v. *Walker*, 26 Ind., 347, where the same question arose and the authority of the several states were reviewed, the court recognized the "*discretionary power*" in the courts in discharging jurors for inability to agree over objections by the prisoner, and said:

"The length of time they were engaged in consultation was sufficient to enable them to determine the possibility of agreeing, and the court, we must presume, was entirely satisfied that to hold them longer would not result in a verdict, and therefore discharged them."

In *Shaffer* v. *State*, 27 Ind., 131, on a similar state of facts, it was also held that the discharge of a jury in a criminal case, without the consent of the accused, after ample time spent in deliberation, because of their ina-

bility to agree on a verdict, does not entitle the defendant to his discharge.

In the case of *State* v. *Wilson*, 50 Ind. 487, the following state of facts was disclosed: On the trial for murder the jury deliberated upon a verdict for thirty-two hours, and then answered that there was no probability of their agreeing upon a verdict, and the court discharged the jury without the presence of the defendant, he being confined in jail. Upon a second trial he pleaded this action of the court in bar of further prosecution, and in passing upon the question the court said:

"We are of the opinion that the discharge of the jury under the circumstances averred in the plea would have been proper, *if the appellant had been present in court*, even though he objected to the discharge, unless he had some good ground why the jury should not have been discharged, and in such a case the discharge could not have been pleaded in bar of further prosecution of the case."

MARYLAND.

In *Hoffman* v. *State*, 20 Md., 425, this precise question was not involved, but the court went even further in declaring that a party had not been in jeopardy where the court, after the jury were empaneled and sworn, discharged them without hearing evidence, against the objection of the defendant.

MASSACHUSETTS.

In *Commonwealth* v. *Purchase*, 19 Mass., 521, it was held upon a trial for murder that where the jury had been deliberating for eighteen hours without being able to agree upon a verdict, and that where it appeared that

further deliberation would have no tendency to bring about an agreement, that they were properly discharged, and that the prisoner could not afterwards successfully raise the plea of former jeopardy.

To the same effect is the case of

Commonwealth v. *Bowden*, 9 Mass., [illegible]

In the former case the court said:

"The principle being admitted that *necessity* is to control the operation of the rule, it follows, of course, that the *court must judge* when the case has happened which will justify them in discharging the jury." (Page 523.)

MICHIGAN.

In *People* v. *Schoeneth*, 44 Mich., 488, the court said:

"There is no claim, and the record affords no ground for saying that the recorder did not act with due discretion in discharging the jury without a verdict. The statement is express that they were 'unable' to agree, and if that was true it became the judge's duty to discharge them, and the prisoner was not thereby relieved from further prosecution. The doctrine is too well-settled to justify discussion."

In *People* v. *Harding*, 53 Mich., 487, the court declared:

"There is no doubt that the report of a jury that they cannot agree is proper evidence upon which the judge should act in determining upon the impossibility of their reaching a verdict. The whole subject is referred to his judgment, and when he decides no one can question his conclusion."

It is true, that in the State of Michigan, there is no constitutional provision similar to that in the State of Illinois, relating to being placed in jeopardy. The provision of the Michigan constitution is that "No person, after

acquittal upon the merits, shall be tried for the same offense." None the less, as is pointed out in that case, the Supreme Court of the State of Michigan has always construed this provision an entitling the accused to the rights given him by the common law. On page 485 the court uses this language:

"This court in its decisions has in several cases given the accused parties the benefit of the common law relief respecting legal jeopardy, in cases where on a former trial the case was disposed of without passing upon the merits."

It thus appears that the Supreme Court of the State of Michigan passed upon the question of former jeopardy, as it existed at common law.

Mississippi.

In *Whitten* v. *State*, 61 Miss., 723, the court declared: "Undoubtedly the inability of the jury to agree, after sufficient deliberation, warrants a discharge."

But in that case it held that three and a half hours was insufficient time for deliberation.

In *Price* v. *State*, 36 Miss., 543, the court, in discussing the discretionary power of a judge to discharge a jury in criminal cases, approved of the doctrine as laid down in 9 Wheaton, *supra*.

New York.

In *People* v. *Greene*, 13 Wend., 57, the jury were out thirty minutes and were discharged. The court held that the prisoner was not in jeopardy thereby, and declared that "temperate discussions may produce unanimity, and

time should be allowed for that purpose; but when such time has been allowed, and the court becomes satisfied that there is no reasonable prospect of agreement by further discussion, it then becomes its duty to discharge." (Page 58.)

In *People* v. *Goodwin*, 18 Johns. Cases, 205, is passing upon the action of the lower court, in discharging the jury after seventeen hours' deliberations, the court declares:

"In the present case, considering the great length of time the jury had been out, that the period for which the court could legally sit was nearly terminated, and that it was morally certain that the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal,"

and held that the discharge, under these circumstances, was not jeopardy.

North Carolina.

In the case of *State v. Jefferson*, 66 N. C., 312, the Supreme Court of that state held that

"Had his Honor remained at the court until Saturday night, ready to instruct the jury, after finding the fact that the case had been with the jury four days, and that from declarations of the jurors in the presence of the others, and in open court before him, he is satisfied the jury would not agree, and that it was useless and not necessary for the purposes of the case to continue the term longer, and thereupon discharged the jury, there would have been no error."

Ohio.

In *Dobbins* v. *State*, 14 Ohio St. Rep., 494, the court came to the same conclusion as that the court may dis-

charge the jury for inability to agree without consent of the prisoner, and further trial be had, but while differing with authorities that it is a matter of *discretion* with the court below, said that the facts upon which the necessity was said to exist must have been considered and passed on by the judge in *the entry of the order for the jury's discharge.*

Rhode Island.

In *State* v. *Nelson,* 35 L. R. A., 560, which was decided by the Supreme Court of Rhode Island, the court declared:

"It is now *well settled* by general practice and concurrent authority, that a jury may be discharged when it is unable to agree upon a verdict. * * * It follows, therefore, that the existence of such facts as will warrant a discharge of the jury *must rest in the discretion of the trial judge.*"

South Carolina.

In *State* v. *McKee,* 1 Bailey, 651, the court said:

"We are enabled to say that a jury, after they are charged, can be discharged, and the prisoner tried a second time for the following causes only: 1. The consent of the prisoner. 2. Illness of one of the jury, prisoner, or the court. 3. Absence of one of the jurymen. 4. *The impossibility of agreeing on a verdict.*"

Texas.

In *Moseley* v.*The State,* 33 Texas, 671, the following state of facts was disclosed by the record: Appellant, Moseley, was on trial for murder. On the first trial the jury disagreed and were discharged by the court because

they were unable to agree, without the coinsent of the prisoner. Upon the second trial he pleaded former jeopardy, and in passing upon the question the court said:

"We are of opinion that the best interests of society may be more fully maintained and subserved by permitting the courts to exercise a sound and careful discretion in holding or discharging a jury, whenever a necessity should arise or the public good require."

The Texas statute in force at the time authorized the court, in its discretion, to discharge the jury after they had been kept together a sufficient length of time as to render it altogether improbable that they can agree. The prisoner's counsel contended that the statute was unconstitutional in that it deprived him of his constitutional right of not being placed in jeopardy a second time, but the court declared the statute constitutional and affirmed the decision of the lower court.

It thus appears from the authorities just cited, that in eleven of the states of this country, the Supreme Courts thereof have determined that the inability of a jury to agree is a "necessity" which warrants the discharge of the jury. In these eleven states the prisoner cannot successfully plead a discharge, made for such reasons, in bar upon a second trial. The Supreme Courts of other states in the Union have held in line with these authorities, but some of them have provisions in their constitutions authorizing the discharge of the jury, after a reasonable length of time for deliberation, because of their inability to agree, and are not authorities on either sides of the question.

The contrary doctrine prevails in Pennsylvania, Tennessee and Virginia, and probably one or two other states.

But the case at bar presents a very much weaker state

of facts for plaintiff in error than most of the cases above cited.

The only facts here upon which to base the inquiry is (1) a record declaring the "jury being unable to agree" were discharged; and (2) that the jury were out about seventeen hours.

Regardless of any mention as to the time they were out, it not appearing of record, (as in most of the cases above cited,) that the defendant objected, it must be presumed that he consented to the discharge of the jury, and for that reason, if no other, is not entitled to complain.

III.

The Indeterminate Sentence Act of the State of Illinois Is Not Unconstitutional.

In his discussion of this question counsel for plaintiff in error first calls attention to the form of the verdict, which is:

"We, the jury, find the defendant, Edward S. Dreyer, guilty of failure to pay over money to his successor in office, in manner and form as charged in the indictment, and we fix the amount thereof to be $316,000; and we fix his punishment at imprisonment in the penitentiary."

and also the judgment of the court committing the defendant upon the verdict, by which—

"It is ordered and adjudged by the court that the said defendant, Eward S. Dreyer, be, an he hereby is, sentenced to the penitentiary of this State, at Joliet, for the crime of failure to pay over money to his successor in office, whereof he stands convicted; and it is further ordrered and adjudged that the said defendant, Edward S. Dreyer, be taken from the bar of the court * * * and be delivered to the warden or keeper of the said peniten-

tiary; and the said warden or keeper is hereby required and commanded to take the body of the said defendant, Edward S. Dreyer, and confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof until discharged by the said board of pardons, as authorized and directed by law, provided said term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced."

It is asserted that there is no crime defined in the Criminal Code of Illinois by the term "failure to pay over to his successor in office," but that the section of the statute under which the defendant was indicted, tried and convicted is entitled "withholding funds." It will be observed that these terms found in the verdict and the sentence of the court are in the exact language of the statute defining the offense.

Counsel also calls attention to the fact that the judgment does not find the amount which the defendant has withheld, and hence under the statute the plaintiff in error could not be committed to the penitentiary at all "unless the money not paid over shall amount to $100." And counsel then asks, "Who is to determine what is the maximum term for the crime of which said defendant was convicted and sentenced?"

The jury having found in the verdict that the amount of money which plaintiff in error was found guilty of failure to pay over was $316,000, under the statute upon which he was indicted his punishment where the sum is over $100 must necessarily be in the penitentiary, as was properly fixed in the verdict and to which he was properly sentenced by the court. No question therefore arises as to the legality of the sentence, either by reason of the form of verdict or the place of punishment designated in

the judgment of the court, nor can any question in relation to these matters be raised in this court.

The principal contention made is that the act under which the sentence was imposed, and which provides that:

"The court imposing said sentence shall not fix the limit or duration of the same, but the term of said imprisonment shall not be less than one year, nor shall it exceed the maximum term provided by law for the crime for which the prisoner was convicted, making allowance for good time, as now provided by law,"

and which provides for the parole of prisoners under rules and regulations established by the board of pardons, and for the discharging of prisoners by the board of pardons, when approved by the Governor, is unconstitutional. The contention is based mainly upon the claim that the act is a delegation of judicial power to the pardoning board "and endows it with the power to inflict punishment unequally on violators of the law."

No argument is advanced to sustain this position, further than to quote the decision of *People* v. *Cummings,* 88 Mich., 249, in which a similar law was held to be unconstitutional, and an unreported decision of a *nisi prius* court in Illinois rendered before a contrary ruling of the highest tribunal of that State.

The law in question is a revision of an earlier statute, differing from it in no material respect, so far as the consideration of the question here involved is concerned, which was declared to be constitutional in the case of *George* v. *People,* 167 Ill., 447. A like conclusion was reached in the case of *People ex rel. Bradley* v. *Illinois State Reformatory,* 148 Ill., 413, involving the construction and validity of a similar law. The same conclusion

has also been reached in considering the constitutionality of similar statutes in Massachusetts, Indiana and Ohio.

Conlon's case, 148 Mass., 168.
Com. v. *Brown*, 167 Mass., 144, 146.
Oliver v. *Oliver*, 169 Mass., 592.
Com. v. *Crowley*, 128 Mass., 121.
Murphy v. *Com.* (Mass.), 43 L. R. A., 154.
Miller v. *State* (Ind.), 40 L. R. A., 109.
State v. *Peters*, 43 Ohio St., 629.

In the above decisions the question here raised as to the delegation of judicial power, and likewise various other objections to these laws relating to their indeterminate features, the uncertainty of the duration of sentence, the character and extent of punishment, the interference with the pardoning power, and every possible constitutional objection were considered, and the laws were upheld.

We cannot add to the reasoning in support of the constitutionality of these laws as set forth in the above decisions. In the *George case*, *supra*, the objections here raised were fully discussed, and it would serve no purpose to cite at length from this or the other decisions. It is enough to say that the *Michigan case*, relied upon by plaintiff in error, stands alone in support of his proposition against the constitutionality of these most salutary laws so wisely calculated to mitigate punishment and reform criminals. In the other states it is expressly held that the provisions of the acts complained of call for ministerial and not judicial acts; that the pardoning power as lodged by the constitution is undisturbed; that the right to trial by jury is unimpaired; that the Legislature may empower penitentiary officials to make rules and regulations for the government and discipline of prisoners, even to the extent

of empowering them to provide for the temporary release of prisoners on parole; that the character and extent of the punishmnt are clearly within the exclusive control of the Legislature; that there is in fact no uncertainty in the sentence under such laws, it in effect being for the maximum term, subject to either absolute or conditional pardon by the pardoning power, after the expiration of the minimum term fixed by the law; that it is the prerogative of the Legislature to fix all punishments for crime, limited by the rule that they must not be cruel or unusual; and that no constitutional right of a prisoner is infringed under such laws.

As stated by one of the judges: "To declare this act unconstitutional would result in the abrogation of our most salutary laws, holding out wise inducements for the reformation of criminals."

Conclusion.

We therefore respectfully submit (1) the "indeterminate sentence" law is valid. (2) The defendant was not placed in jeopardy from the fact that the jury in the first trial were discharged for their inability to agree; and in the absence of anything in the record to the contrary it must be presumed that the defendant consented thereto. (3) It appearing from the record of his last trial that the jury retired in charge of *sworn* officers it must be taken as a fact that they were duly and properly sworn, and the defendant not having objected to the oath administered, and having stood by cognizant of all the proceedings, cannot now be heard to complain, nor can he impeach the

record of this fact by affidavits. (4) Neither of the last two questions are properly raised by the record.

Respectfully submitted.

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Supreme Court of the United States.

No. 37.—October Term, 1902.

Edward S. Dreyer, Plaintiff in Error, vs. The People of the State of Illinois. } In error to the Supreme Court of Illinois.

[November 10th 1902.]

By an indictment returned in the Criminal Court of Cook County Illinois, on the 4th day of February 1899, the plaintiff in error Dreyer was charged with the offense of having failed to turn over to his successor in office, as treasurer of the West Chicago Park Commissioners, revenues, bonds, funds, warrants and personal property that came to his hands as such treasurer, of the value of $316,013.40—said Commissioners constituting a Board of Public Park Commissioners appointed by the Governor and confirmed by the Senate of Illinois, and as such having the supervision of the public parks and boulevards in the town of West Chicago and authority under the law to collect and disburse moneys, bonds, &c., for their maintenance.

The indictment was based on section 215 of the Criminal Code of Illinois, which is as follows:

"If any State, county, town, municipal or other officer or person who now is or hereafter may be authorized by law to collect, receive, safely keep or disburse any money, revenue, bonds, mortgages, coupons, bank bills, notes, warrants or dues, or other funds or securities belonging to the State or any county, township, incorporated city, town or village, or any State institution, or any canal, turnpike, railroad, school or college fund, or the fund of any public improvement that now is or may hereafter be authorized by law to be made, or any other fund now in being or that may hereafter be established by law for public purposes, or belonging to any insurance or other company or person required or authorized by law to be placed in the keeping of any such officer or person, shall fail or refuse to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over, or his agent or attorney, authorized in writing, he shall be imprisoned in the penitentiary not less than one *nor more than ten years: Provided*, Such demand need not be made when, from the absence or fault of the offender, the same cannot conveniently be made: *And provided*, That no person shall be committed to the penitentiary under this section unless the money not paid over shall amount to one hundred dollars,

or if it appear that such failure or refusal is occasioned by unavoidable loss or accident. Every person convicted under the provisions of this section shall forever thereafter be ineligible and disqualified from holding any office of honor or profit in this State." *Hurd's Revised Statutes*, 1901, *p.* 630, § 215.

A trial was commenced on the 29th day of August 1899 and a jury was empaneled and evidence heard. The jury not having agreed upon a verdict were discharged.

A second trial was begun on the 19th day of February 1900. The defendant filed a plea of once in jeopardy, which in substance averred that it was not true, as recited in the order of court at the previous trial, that the jury were unable to agree upon a verdict; also, that the discharge of the jury was without the defendant's assent, was against his objections made at the time, and was without any moral or physical necessity justifying such a course on the part of the trial court.

On motion of the State, the plea of former jeopardy was stricken from the files, the defendant at the time excepting to the action of the court.

There was a second trial which resulted in the defendant being found "guilty of failure to pay over money to his successor in office, in manner and form as charged in the indictment," the jury stating in the verdict that the amount not paid over to be $316,000, and imposing the punishment of confinement in the penitentiary.

The defendant upon written grounds filed moved for a new trial, and also moved in arrest of judgment. Both motions were overruled, and it was ordered and adjudged that the defendant be sentenced to the penitentiary "for the crime of failure to pay over money to his successor in office, whereof he stands convicted."

The judgment of the trial court having been affirmed by the Supreme Court of Illinois the case is here upon writ of error allowed by the Chief Justice of that court.

Mr. Justice HARLAN, after stating the facts as above reported, delivered the opinion of the Court.

It is contended that the judgment of the Supreme Court of Illinois, affirming the judgment in the present case of the Criminal Court of Cook County, in that State, denied to the plaintiff in error certain rights secured to him by the Constitution of the United States, particularly by the clause of the Fourteenth Amendment forbidding a State to deprive any person of liberty without due process of law.

The defendant insists that three questions, involving rights secured by the Constitution of the United States, are presented by the assignments of error.

1. The first of those questions, as stated by his counsel, relates to the alleged "omission to swear the bailiffs in the manner prescribed by the common law and the statutes of the State of Illinois before the jury retired to consider of their verdict." This point will be first examined.

The Criminal Code of Illinois provides: "When the jury retire to consider of their verdict, in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted) unless by leave of court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court: *Provided*, In cases of misdemeanor only, if the prosecutor for the people and the person on trial by himself or counsel shall agree, which agreement shall be entered upon the minutes of the court, to dispense with the attendance of any officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict so delivered to the clerk as the lawful verdict of such jury." *Hurd's Rev. Stat. Ill.* 1901, § 435.

Referring to this section the Supreme Court, in the present case, said that it was reversible error in a trial for a felony to allow the jury to retire for the purpose of considering their verdict without being placed in charge of a sworn officer as required by the statute—citing *McIntyre* v. *People*, 38 *Ill.* 514, 518; *Lewis* v. *People*, 44 *Ill.* 452, 454; *Sanders* v. *People*, 124 *Ill.* 218, and *Farley* v. *People*, 138 *Ill.* 97. In *Lewis* v. *People*, just cited, the court observed that the provisions of the above section "show the great care and solicitude of the General Assembly to secure to every person a fair and impartial trial; and it is eminently proper, as in many cases the accused is imprisoned and it is not in his power to protect his rights from being prejudiced by undue influences. It should ever be the care of courts of justice to guard human life and liberty against being sacrificed by public prejudice or excitement. The jury should be entirely free from all outside influences from the time they are empaneled until they return their verdict and it is accepted and they discharged, and the legislature have determined that the provisions of this statute are necessary to accomplish the object. It is a provision easily complied with, and one member of the court, at least, has never, in practice, seen it dispensed with except in cases of misdemeanor. The provisions of the statute are clear, explicit and peremptory. We know of no power, short of its repeal, to dispense with this requirement."

But the court further said: "The point of controversy in the present case is not, however, whether it is reversible error to fail to comply with the statute,

but whether the question is properly raised upon this record. No objection or exception was taken by the defendant, at the time of the retirement of the jury, that the officers in charge of it were not sworn, but the question was raised by him for the first time on his motion for new trial, one of the grounds of that motion being 'that when the jury retired to consider of their verdict in said case no constable or other officer was sworn or affirmed to attend the jury, in manner and form as provided by the statute of the State of Illinois.' . . Affidavits made by the bailiffs themselves, and by an assistant of the prosecuting attorney, who participated in the trial, tend to prove that the oath administered was in the statutory form; but these affidavits also show that the only oath administered to them was on the 21st day of February, immediately after the empaneling and swearing of the jury. It is shown by the bill of exceptions that the trial was not concluded and the jury finally sent out until February 28th, so that even by the proof made on behalf of the people the only oath taken by the bailiffs was some six days prior to their retirement with the jury, and prior to the introduction of evidence and the subsequent steps of the trial. This cannot be held to be a compliance with the requirement of the statute that 'when the jury shall retire to consider of their verdict,' &c., 'a constable or other officer shall be sworn,' &c. To swear the bailiffs immediately upon the jury being sworn, and prior to the introduction of the evidence, the arguments of counsel and instructions of the court—six or seven days prior to the retirement of the jury to consider of their verdict—would be little less than farcical."

It was, however, held, that under the principles established by former decisions in Illinois, the requirement of the statute could be waived by the accused, and that his failure to object at the time that the officer having charge of the jury was not sworn when the jury retired was equivalent to a waiver of compliance with its provisions. And it was adjudged "that the question whether or not, upon the retirement of the jury to consider of its verdict, it was placed in charge of a constable, or other officer, sworn to attend it, as prescribed by statute, is not properly raised by the record [of this case] and therefore [is] not available as error in this court,"

It thus appears that while the State court expressly recognized the rights of the accused under the statute it adjudged that he had not properly raised on the record the question raised for the first time on motion for a new trial as to non-compliance with its provisions. But manifestly this decision presents no question of a Federal nature. A ruling to the effect that the accused shall be deemed to have waived compliance with the statute if the record does not show that he objected at the time to the action of the court, was an adjudication simply of a question of criminal practice and local law, was not in derogation of the substantial right recognized by the statute, and did not impair the constitutional guaranty

that no State shall deprive any person of liberty without due process of law. We cannot perceive that such a decision by the highest court of the State brings the case upon this point within the Fourteenth Amendment, even if it should be assumed that the due process of law prescribed by that Amendment required that a jury in a felony case should be placed in charge of an officer especially sworn at the time to attend and keep them together until they return their verdict or were discharged.

We adjudge that in holding that the record did not sufficiently present for consideration the question now raised, the State court, even if it erred in its decision, did not infringe any right secured to the defendant by the Constitution of the United States.

2. Another question which counsel for the defendant contends is raised by the assignments of error relates to the final judgment of the Criminal Court of Cook County. It was adjudged by the trial court that the defendant be taken to the penitentiary of the State, at Joliet, and delivered to its warden or keeper, who was required and commanded to "confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof, *until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced.*"

The judgment was in conformity with a statute of Illinois approved April 21st 1899, entitled "An act to revise the law in relation to the sentence and commitment of persons convicted of crime, and providing for a system of parole," &c. The statute is sometimes referred to as the Indeterminate Sentence Act of Illinois, and as its validity under the Constitution of the United States is assailed its provisions must be examined.

That statute provides that every male person over twenty years of age, and every female person over eighteen years of age, convicted of a felony or other crime punishable by imprisonment in the penitentiary, except treason, murder, rape and kidnapping, shall be sentenced to the penitentiary, the court imposing the sentence to fix its limit or duration, the term of such imprisonment not to be less than one year, nor exceeding the maximum term provided by law for the crime of which the prisoner was convicted, making allowance for good time, as provided by law. § 1.

It was made the duty of each board of penitentiary commissioners to adopt such rules concerning prisoners committed to their custody as would prevent them from returning to criminal courses, best secure their self-support, and accomplish their reformation. To that end it provided that whenever any prisoner was received into the penitentiary the warden should cause to be entered in a register the date of his admission, the name, nativity, nationality, with such other facts as could be ascertained, of parentage, education, occupation and early social influences as seemed to

indicate the constitutional and acquired defects and tendencies of the prisoner, and, based upon these, an estimate of his then present condition, and the best probable plan of treatment. And the physician of the penitentiary was required to carefully examine each prisoner when received and enter in a register the name, nationality or race, the weight, stature and family history of each prisoner, also a statement of the condition of the heart, lungs and other leading organs, the rate of the pulse and respiration, and the measurement of the chest and abdomen, and any existing disease or deformity, or other disability, acquired or inherited. Upon the warden's register was to be entered from time to time minutes of observed improvement or deterioration of character, and notes as to the method and treatment employed; also all alterations affecting the standing or situation of the prisoner, and any subsequent facts or personal history brought officially to his knowledge bearing upon the question of the parole or final release of the prisoner; and it was the duty of the warden, or, in his absence, the deputy warden, of each penitentiary to attend each meeting of the Board of Pardons held at the penitentiary of which he was warden, for the purpose of examining prisoners as to their fitness for parole. He shall advise with that Board concerning each case, and furnish it with his opinion, in writing, as to the fitness of each prisoner for parole whose case the board considered. And it was made the duty of every public officer to whom inquiry was addressed by the clerk of the Board of Pardons, concerning any prisoner, to give the board all information possessed or accessible to him, which might throw light upon the question of the fitness of the prisoner to receive the benefits of parole. § 2.

It was made the duty of the judge before whom any prisoner was convicted, and also the State's Attorney, of the county in which he was convicted, to furnish the board of penitentiary commissioners an official statement of the facts and circumstances constituting the crime whereof the prisoner was convicted, together with all other information accessible to them in regard to the career of the prisoner prior to the time of the commital of the crime of which he was convicted, relative to his habits, associates, disposition and reputation, and any other facts and circumstances tending to throw any light upon the question as to whether such prisoner was capable of again becoming a law-abiding citizen. § 3.

Other sections of the statute are as follows:

"4. The said Board of Pardons shall have power to establish rules and regulations under which prisoners in the penitentiary may be allowed to go upon parole outside of the penitentiary building and enclosure: *Provided*, That no prisoner shall be released from either penitentiary on parole until the State Board of Pardons, or the warden of said penitentiary, shall have made arrangements, or shall have satisfactory evidence, that arrangements have been made for his honorable and useful employment while upon parole, in

some suitable occupation, and also for a proper and suitable home, free from criminal influences, and without expense to the State: *And provided further*, That all prisoners so released upon parole shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the warden of the penitentiary from which they were paroled, and shall, during the said time, be considered as remaining under conviction for the crime of which they were convicted and sentenced and subject at any time to be taken back within the enclosure of said penitentiary, and full power to enforce such rules and regulations, and to retake and reimprison any inmate so upon parole is hereby conferred upon the warden of said penitentiary, whose order or writ, certified by the clerk of said penitentiary, with the seal of the institution attached, and directed to all sheriffs, coroners, constables, police officers, or to any particular person named in said order or writ, shall be sufficient warrant for the officer or other person named therein to authorize said officer or person to arrest and deliver to the warden of said penitentiary the body of the conditionally released or paroled prisoner named in said writ, and it is hereby made the duty of all sheriffs, coroners, constables, police officers, or other persons named therein, to execute said order or writ the same as any other criminal process. In case any prisoner so conditionally released or paroled shall flee beyond the limit of the State, he may be returned, pursuant to the provisions of the law of this State relating to fugitives from justice. It shall be the duty of the warden, immediately upon the return of any conditionally released or paroled prisoner, to make report of the same to the State Board of Pardons, giving the reasons for the return of said paroled prisoner: *Provided further*, That the State Board of Pardons may, in its discretion, permit any prisoner to temporarily and conditionally depart from such penitentiary on parole and go to some county in the State named and there remain within the limits of the county, and not to depart from the same without written authority from said board, for such length of time as the board may determine, and upon the further condition that such prisoner shall, during the time of his parole, be and continuously remain a law-abiding citizen of industrious and temperate habits, and report to the sheriff of the county on the first day of each month, giving a particular account of his conduct during the month, and it shall be the duty of such sheriff to investigate such report and ascertain what has been the habits and conduct of such prisoner during the time covered by such report, and to transmit such report, upon blanks furnished him by the warden of the penitentiary, to said warden within five days after the receipt of such prisoner's report, adding to such report the sheriff's statement as to the truth of the report so made to him by the prisoner. It shall also be the duty of such sheriff to keep secret the fact that such prisoner is a paroled prisoner, and in no case divulge such fact to any person or persons so long as said prisoner obeys the terms and conditions of his parole.

"5. Upon the granting of a parole to any prisoner the warden shall provide him with suitable clothing, ten dollars in money, which may be paid him in installments at the discretion of the warden, and shall procure transportation for him to the place of his employment, or to the county seat of the county to which he is paroled.

"6. It shall be the duty of the warden to keep in communication, as far as possible, with all prisoners who are on parole from the penitentiary of which he is the warden, also with their employers, and when in his opinion any prisoner who has served not less than six months of his parole acceptably, has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the warden shall make certificate to that effect to the State Board of Pardons; and whenever it shall be made to appear to the State Board of Pardons from the warden's report, or from other sources, that any prisoner has faithfully served the term of his parole, and the board shall be of the opinion that such prisoner can safely be trusted to be at liberty, and that his final relief will not be incompatible with the welfare of society, *the State Board of Pardons shall have the power to cause to be entered of record in its office an order discharging such prisoner for, or on account of his conviction, which said order, when approved by the Governor, shall operate as a complete discharge of such prisoner, in the nature of a release or commutation of his sentence, to take effect immediately upon the delivery of a certified copy thereof to the prisoner, and the clerk of the court in which the prisoner was convicted shall, upon presentation of such certified copy, enter the judgment of such conviction satisfied and released pursuant to said order.* It is hereby made the duty of the clerk of the Board of Pardons to send written notice of the fact to the warden of the penitentiary of the proper district whenever any prisoner on parole is finally released by said board." *Laws of Ill.* 1899, *p.* 142.

In this connection we are referred to Article 3 of the Constitution of Illinois, dividing the powers of government into three distinct departments—legislative, executive, judicial—and providing that "no person or collection of persons being one of those departments shall exercise any power belonging to either of the others, except as hereinafter expressly directed or permitted;" to section 1 of Article 6 of the same constitution, providing that "the judicial powers, except as in this article otherwise provided, shall be vested in one Supreme Court, Circuit Courts, county courts, justices of the peace, police magistrates, and such courts as may be created by the law in and for cities and incorporated towns;" and to section 13 of Article 5, providing that the pardoning power shall be in the Governor of the State.

If we do not misapprehend the position of counsel, it is that the Indeterminate Sentence Act of 1899 is inconsistent with the above provisions

of the State Constitution, in that it confers judicial powers upon a collection of persons who do not belong to the judicial department, and, in effect, invests them with the pardoning power committed by the Constitution to the Governor of the State.

We will not stop to consider whether the statute is in conflict with the provisions of the State Constitution to which reference is here made. We may, however, in passing observe that a similar statute, previously enacted, was upheld by the Supreme Court of Illinois. *George* v. *The People*, 167 *Ill.* 447. It is only necessary now to say that even if the statute in question were obnoxious to the objection now urged by plaintiff in error, it would not follow that this court would review a judgment of the highest court of the State which expressly or by necessary implication sustained it as constitutional. A local statute investing a collection of persons not of the judicial department with powers that are judicial and authorizing them to exercise the pardoning power which alone belongs to the Governor of the State, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the Fourteenth Amendment would not be infringed by a local statute of that character. Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. "When we speak," said Story, "of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution." *Story's Const. 5th ed.* 393. Again: "Indeed, there is not a single constitution of any State in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it." *Id.* 395.

The objection that the act of 1899 confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any question under the due-process clause of the Fourteenth Amendment.

3. The remaining contention of the defendant is that, under the circumstances disclosed by the record, the second trial of the case placed him twice in jeopardy, and therefore the judgment should be reversed.

Under date of September 1st 1899 the following order was made of record in the case: "This day come the said People, by Charles S. Deneen, State's Attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and also come the jurors of the jury aforesaid; and the aforesaid jury hearing the arguments of counsel and instructions of the court, retire in charge of sworn officers to consider of their verdict." And under date of September 2d this order appears: "This day come the said People, by Charles S. Deneen, State's Attorney, and the defendant, as well in his own proper person as by his counsel, also comes. And also come the jurors of the jury aforesaid, being now returned into court, and, *being unable to agree upon a verdict, are thereupon by order of this court discharged from further consideration of this cause.*"

It seems to be undisputed that the case was submitted to the jury at four o'clock in the afternoon and that the jury having retired to consider of their verdict were kept together until nine o'clock and thirty minutes in the morning of the succeeding day, when they were finally discharged from any further consideration of the case.

The contention is that, notwithstanding the recital in the record that the jury were discharged by the court because they were unable to agree upon a verdict, such discharge was without moral or physical necessity and operated as an acquittal of the defendant.

Upon the face of the question under examination the inquiry might arise whether the due process of law required by the Fourteenth Amendment protects one accused of crime from being put twice in jeopardy of life or limb. In other words, is the right not to be put twice in jeopardy of life or limb forbidden by the Fourteenth Amendment; or, so far as the Constitution of the United States is concerned, is it forbidden only by the Fifth Amendment which prior to the adoption of the Fourteenth Amendment had been held as restricting only the powers of the National Government and its agencies?

We pass this important question without any consideration of it upon its merits, and content ourselves with referring to the decision of this court in *United States* v. *Perez*, 9 *Wheat.* 579. That was a capital case—in which without the consent of the prisoner or of the attorney of the United States, the jury being unable to agree were discharged by the court from giving any verdict—this court, speaking by Mr. Justice Story, said: "We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with authority to discharge a jury from

giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and consciencious exercise of this discretion rests in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings and gives no right of exemption to the prisoner from being again put upon trial." If the due process of law required by the Fourteenth Amendment embraces the guarantee that no person shall be put twice in jeopardy of life or limb—upon which question we need not now express an opinion—what was said in *United States* v. *Perez* is applicable to this case upon the present writ of error and is adverse to the contention of the accused that he was put twice in jeopardy.

The principles settled in *United States* v. *Perez*, we may remark, were reaffirmed in *Ex parte Lange*, 18 *Wall.* 175; *Simmons* v. *United States*, 142 *U. S.* 148; *Logan* v. *United States*, 144 *U. S.* 263; *Thompson* v. *United States*, 155 *U. S.* 274.

The conclusion is, that the judgment of the Supreme Court of Illinois did not deny to the plaintiff in error any right secured by the Constitution of the United States, and is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.